

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

VOLUME 5 (P.M. portion)

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I N D E XDIRECT CROSS EXAMINATIONWITNESSES ON BEHALF OF
THE PLAINTIFF:

William Herndon Lehr

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Jason Zabek
(by video deposition)

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1 A F T E R N O O N S E S S I O N

2 (Jury out.)

3 THE COURT: All right. Any preliminary matters?

4 MR. WARIN: Not that we're aware of, Your Honor.

5 THE COURT: Okay.

6 MR. BUCKLEY: We got the screens figured out.

7 THE COURT: Great. All right, Joe, let's get our
8 jury.

9 THE COURT SECURITY OFFICER: Your Honor, we are one
10 missing, one juror missing.

11 THE COURT: Okay. My chair is really starting to
12 squeak rather loudly. I'm sorry.

13 MR. BUCKLEY: Is that yours? I've been hearing that.

14 THE COURT: Well, there's also some real strange,
15 high-pitched sound that we have not identified, but the
16 squeaking is my chair, and I'll get the WD-40 after you guys
17 are gone.

18 (Jury present.)

19 THE COURT: All right, please be seated. I hope you
20 had a good lunch.

21 And, Mr. Warin, your next witness, sir.

22 MR. WARIN: Your Honor, we'd like to call as our next
23 witness William Lehr.

24 THE COURT: All right. Mr. Lehr, come forward.

25 THE COURT SECURITY OFFICER: Over here, sir. Please

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1 face the clerk. Raise your right hand. Left hand on the
2 Bible, please.

3 WILLIAM HERNDON LEHR, PLAINTIFF'S WITNESS, SWORN

4 DIRECT EXAMINATION

5 BY MR. WARIN:

6 Q. Good afternoon, sir.

7 A. Good afternoon.

8 Q. Would you state your full name.

9 A. William Herndon Lehr.

10 Q. What work do you do, Mr. Lehr?

11 A. I'm an economist at the Massachusetts Institute of
12 Technology in their computer science and artificial
13 intelligence laboratory, where I participate in
14 multidisciplinary research on the Internet, telecommunications,
15 and digital media industries.

16 Q. Is that Cambridge, Massachusetts?

17 A. That's in Cambridge Massachusetts.

18 Q. What is your education beyond high school?

19 A. I have a Ph.D. in Economics from Stanford University. I
20 have an MBA in Finance from the Wharton Business School. I
21 have a graduate -- an undergraduate degree in engineering, and
22 also an undergraduate in history from the University of
23 Pennsylvania.

24 Q. All right. Dr. Lehr, I'd like you to take a look, if you
25 could, at a book in the binders that we're going to be passing

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1 out.

2 Dr. Lehr, could you look at the second tab there,
3 which is labeled DTX 3415?

4 A. Yes.

5 Q. Do you recognize it?

6 A. I do.

7 Q. All right. Would you tell us what it is?

8 A. This is my curriculum vitae, or resume.

9 Q. All right. Does it summarize your educational and
10 employment history?

11 A. Yes.

12 MR. WARIN: All right. Your Honor, I'd like to move
13 the admission of DTX 3415.

14 MR. BUCKLEY: No objection.

15 THE COURT: All right, it's received.

16 BY MR. WARIN:

17 Q. You indicated that you worked at MIT. Does your work
18 there have any particular focus or specialty?

19 A. Yes. I'm interested in the economic and regulatory
20 implications of changes in the technologies and markets for
21 Internet, telecommunications, and digital media.

22 Q. Have you written or published any articles on those
23 topics?

24 A. Yes. I've published quite a number of them.

25 Q. All right. I'd like to refer you to your resume, which is

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1 in front of us, and specifically page 3. It list "Appendix A"
2 at the top. Do you see that?

3 A. Yes.

4 Q. Could you tell us what's listed beginning under the
5 caption "Papers and Publications"?

6 A. This is a list of the papers and publications that I've
7 authored or coauthored, and it goes on for a number of pages.

8 Q. All right. So this begins on page 3 and continues. If we
9 could, Karl, go all the way to page 12.

10 All right. So from page 3 to page 12, it lists all
11 the various publications and articles you've written?

12 A. Yes.

13 Q. And these would be generally on topics of economics and
14 media and communication?

15 A. Yes, these are on the economic issues and things that my
16 research is on.

17 Q. All right. Have you taught any courses either at MIT or
18 elsewhere?

19 A. Yes. I've taught graduate courses at Massachusetts
20 Institute of Technology, MIT, also the Graduate School of
21 Business at Columbia University, Cambridge University in
22 England, and some other places, on such things as competitive
23 strategies and media industries, the economics of the Internet,
24 telecommunications, pricing, those sorts of things.

25 Q. Are some of the courses you've taught also listed on your

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1 resume?

2 A. Yes.

3 Q. All right. Karl, if I could draw your attention to the
4 bottom of page 2 there?

5 Are those some of the courses?

6 A. Yes.

7 Q. Do they continue over onto page 3?

8 A. Yes.

9 Q. Have you done any work in connection with this lawsuit?

10 A. Yes.

11 Q. All right. What were you asked to do?

12 A. I was asked to provide economic analysis of a number of
13 the issues of importance in this case, and more specifically, I
14 was asked to opine or analyze three issues: first, to take a
15 look at what the economics says about whether or not copyright
16 holders suffer economic harm as a result of infringement; two,
17 to take a look at what might be the incentives and economic
18 impacts on Cox of tolerating infringement or acting so as to
19 deter infringement; and three, looking at actually, you know,
20 what the economic benefit -- to estimate the economic benefit
21 to Cox of retaining and having subscribers on its network.

22 Q. All right. Are you giving any legal opinions concerning
23 copyrights today or copyright infringement?

24 A. No.

25 Q. All right. What documents did you review in order to form

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1 your opinions on those three issues you just listed?

2 A. Well, in addition to the materials I consider in the
3 normal course of my research and work, I looked at a number of
4 documents that were specific to this matter. Those included
5 financial documents relating to the costs and revenues
6 associated with different services that Cox offers, a number of
7 other documents describing how Cox thinks about some of those
8 services, a number of the depositions in this matter, and then
9 some other research that, you know, I discovered and found
10 useful in coming to the opinions I've come to.

11 Q. Did you read any general articles on Internet economics
12 and the economics of copyright infringement on the Internet?

13 A. Yes. I mean, I read a lot of that kind of stuff in the
14 normal course of my business, but I examined the literature on
15 this topic quite extensively as part of the basis of
16 formulating my opinions today.

17 Q. All right. Are you charging for your work on this case?

18 A. I am. I bill hourly at the rate of \$650 an hour.

19 Q. And approximately how many hours have you spent so far in
20 getting -- preparing your report and getting ready for your
21 testimony today?

22 A. Between 200 and 250 hours.

23 Q. All right. Is the payment of your fees in any way
24 contingent on the outcome of this case?

25 A. No. I bill on an hourly basis, and whatever happens is

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1 whatever happens.

2 Q. Were you able to form any opinions on those topics you
3 were asked to research, namely, the economic impact that online
4 copyright infringement has on copyright holders, to determine
5 how much revenue and profit Cox makes from its residential
6 high-speed Internet services, Cox's economic incentives, etc.,
7 the ones you listed earlier?

8 A. Yes, I was.

9 MR. WARIN: All right. Your Honor, I would offer
10 Dr. Lehr as an expert in the field of economics, Internet
11 telecommunications, and media industries.

12 THE COURT: Any objection?

13 MR. BUCKLEY: No objection, Your Honor.

14 THE COURT: Proceed.

15 BY MR. WARIN:

16 Q. All right. Dr. Lehr, I'd like to walk you through a
17 summary of the opinions or conclusions that you've reached.
18 Have you prepared a slide that summarizes your opinions?

19 A. I have.

20 Q. All right. Karl, could we have that displayed, please?

21 All right. Is this the slide that you prepared that
22 summarizes the three principal conclusions you've reached?

23 A. Yes, it is.

24 Q. Why don't you walk through somewhat briefly each of those
25 and explain them to the jury, because we'll spend a little more

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1 time going through each of these and ask you to explain the
2 underlying basis for your conclusions. All right, let's start
3 with this overall slide.

4 A. So, so the first opinion is that copyright infringement
5 causes significant economic harm to copyright holders, and
6 that's broadly supported by the economic literature, but
7 because the economic literature includes a diversity of data
8 sets and methods and all of that, it's not possible in the
9 context of the literature to accurately estimate or come up
10 with a single estimate of what that harm is for the industry,
11 and it's impossible in the context of an individual rights
12 holder.

13 Q. All right, that's your first conclusion. What's your
14 second conclusion or opinion?

15 A. That subscribers to Cox are very valuable, and there's
16 evidence that indicates that a number of Cox subscribers are
17 infringing, and those subscribers are also very valuable, so
18 that Cox is deriving significant financial economic benefit
19 from having infringing subscribers on its network.

20 Q. And your third conclusion?

21 A. That in light of that second conclusion, if you look at
22 the economic incentives that Cox has to tolerate infringement,
23 they're substantial, and were it to take actions that would
24 deter the infringement, that would actually -- that would be
25 likely to disrupt their relationship with their subscribers,

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1 and so they have strong economic incentives not to do anything
2 like that.

3 Q. I'd like to take you through each of your three opinions
4 one by one. So let's start with the first one, that copyright
5 infringement causes significant harms to copyright holders that
6 are impossible to quantify accurately.

7 Have you prepared another slide that summarizes the
8 basis for your conclusion?

9 A. Yes. If we could go to the next slide?

10 What this slide summarizes is, first, if you think of
11 the economic theory of why one might expect there to be harm,
12 you can identify a number of ways that harm would arise, and
13 that's what I'll talk about on this slide, and -- but having
14 identified those, then you have to look at is there actual
15 evidence. In other words, the theory says this is what would
16 happen, but what does the data say when you actually look at
17 the data? And I'll do both of those.

18 So first, the most obvious thing is if you're trying
19 to sell copyright materials legally and you're competing
20 against free copies, that's going to harm your ability to sell
21 those free copies.

22 Q. Free copies of the same material?

23 A. Of the same material.

24 So when people are out there saying, gee, should I
25 buy, you know, the market, should I pay for and buy legal

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1 copies of the material, their willingness to do that, the
2 likelihood they'll do that is much less if there's illegal
3 copies out there. So the illegal copies cannibalize the
4 revenues and the profits of legal sales, and that's the most
5 substantial and direct, and the focus in most of the empirical
6 estimates is how much are sales reduced because of the
7 prevalence of illegal copies in the marketplace.

8 Q. The second point you've got there?

9 A. Well, the second one about the infringing downloads and
10 uploads are displacing the legitimate sales, that's a
11 refinement really of the first point.

12 The, the third bullet points identifies the fact that
13 when there are illegal sales out there, it's not just that the
14 companies sell fewer units. It's also their ability to price
15 the units they still manage to sell is adversely affected, and
16 that adversely impacts their business models.

17 So, for example, a copyright holder might not want to
18 or not be able to reduce very high-resolution versions of the
19 content, because if they release those very high-resolution
20 versions of the content, even if consumers might be willing to
21 pay more for those, that makes it even easier for other
22 pirates, that if they get a pirated copy of that, to abuse it,
23 and it distorts other aspects of their business model.

24 And then --

25 Q. You use the word "piracy" here. What do you mean by

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1 piracy?

2 A. Sorry. What I mean by piracy is the infringing illegal --
3 taking use of copyright materials without the copy -- the
4 authorization of the copyright holders.

5 Q. All right. And your last bullet point?

6 A. The last bullet point is that the rights holders have, you
7 know, expended quite a bit of money over the years attempting
8 to try and combat piracy in addressing this problem, because
9 it's a big, huge source of economic harm to them.

10 Q. All right. Now, in reaching these conclusions and your
11 overall conclusion that Internet piracy causes harms to holders
12 of copyrights, did you review any materials, literature,
13 documents, articles, summaries, things of that sort?

14 A. Yes, I did. If you'd go to the next slide?

15 Q. Next slide, please.

16 A. This is a slide that shows a sample of the number of
17 papers, you know, that are well known in this literature,
18 there -- that this is not by any means the universe of these
19 papers. There's a lot more of these kinds of papers. But if
20 you just look at these papers and you sort of see these
21 percentages and you see the dollar amounts, the thing you'll
22 notice is these percentages refer to these various papers that
23 are estimating the reduction in sales as a consequence of the
24 piracy, using different sorts of data sets, using different
25 time periods and different methods.

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1 But in all cases, you're seeing large percentage
2 numbers, in many cases a double-digit percentage reduction in
3 sales. That's a big number. And when they mention things like
4 dollars, you know, they're talking often about on the industry
5 effects in the billions of dollars.

6 Q. All right. Are you familiar with any of these authors?

7 A. Yes. I know Joel Waldfogel and I know Jon Peha.

8 Q. All right. And are they recognized as proficient in these
9 areas?

10 A. Yes. I mean, they're both well-known academics.

11 Q. Are there any one of these particular articles that you
12 focused on in terms of reaching your conclusions with respect
13 to the quantification or how substantial the impact is?

14 A. Yes. I mean, I can talk about -- these are actually
15 representative of what the sort of balance of literature says,
16 and if we go to, like, the next slide, I think, pulls up one of
17 the particular ones. So this is the paper from Mateus and Peha
18 that was --

19 Q. That was listed on the earlier page?

20 A. That was listed on the earlier one. And this is a 2011
21 paper, and one reason I'm highlighting this is they took --
22 they looked specifically at BitTorrent, and what they were
23 interested in trying to understand was for the consumers they
24 looked at who were engaged in illegal downloads, how many fewer
25 copies of legal content songs did they buy, and they concluded

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1 that, you know, the number of copies transferred is an order of
2 magnitude greater than the number sold through legal channels.

3 For example, we estimate that 10.7 songs were
4 transferred using BitTorrent for every song sold. So that kind
5 of result is pretty typical in the findings that you see in
6 this literature.

7 You know, they also find that the vast majority of
8 music and video content transferred using BitTorrent is indeed
9 copyrighted, there's a bunch of other evidence that
10 demonstrates that, and that copyright holders fail to recognize
11 significant revenues as a result, which is sort of the direct,
12 obvious conclusion that falls from that. And then further down
13 in that paper, they estimate that if you scale the effects to
14 the size of the industry, that would suggest a loss to the
15 industry of 7 to 13 billion dollars.

16 Q. All right. Are there any other articles that you relied
17 on or reviewed that talked about the content of copyrighting or
18 legal material, one or the other, on the Internet with respect
19 to BitTorrent?

20 A. Well, there's one other thing -- I think it's -- you know,
21 we can highlight today, if you go to the next slide.

22 This is a paper by Danaher, Smith, and Telang. And
23 it's interesting because it's a 2014 paper, and the purpose of
24 this paper was to provide a survey article. So these are some
25 well-known economists doing a survey article basically saying

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1 what does the economic literature on this question have to say.

2 And this was published in an NBER working paper
3 series. The NBER is the National Bureau of Economic Research,
4 which is one of the premier empirical research groups that
5 draws up scholars from multiple universities. So this is, you
6 know, one of the things that professional economists, academic
7 economists, they would look to these kind of papers.

8 And they conclude in looking at this, and they've got
9 a long bibliography in this paper.

10 Q. Bibliography --

11 A. Yeah, they go and --

12 Q. Is this a list of the resources they reviewed?

13 A. That's right. So they cite the papers that I cited and a
14 bunch of other papers, and they have say, "While the academic
15 literature is not uniform in finding harm, taken as a whole, we
16 see a very consistent story across the academic literature.
17 The vast majority of papers which have been published in
18 peer-reviewed academic journals, papers spanning a variety of
19 methods, time periods, and contexts, find that piracy causes a
20 statistically significant decrease in sales."

21 So they've gone and they've looked at all the
22 research that was done, the results of which become these
23 papers they're referencing, and when you do economic research
24 and you do this kind of econometric research, often the problem
25 is you can't find an effect because there's just not enough

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1 evidence in the data.

2 They're saying consistently they're finding an effect
3 that's significant, and consistently that significant effect
4 they're finding is that there's economic harm. So that's --
5 you know, this is very consistent with sort of the opinion I
6 came to looking at the same problem.

7 Q. All right. So the economic harm they're talking about
8 here is lost sales?

9 A. It's -- well, they are -- different people measure it in
10 different ways. Ultimately, it's the lost sales, and then do
11 they measure in the lost units or loss revenue or lost profits.
12 They do it a bunch of different ways across the literature, but
13 ultimately, it comes down to displaced sales.

14 Q. Other than displaced or lost sales, do you have an opinion
15 as to whether or not there's any other harm to copyright
16 holders as a result of illegal infringement on the Internet?

17 A. Well, I mentioned some of the other ones on the slide when
18 I was talking about the background, and it's harder to
19 estimate. So, for example, the adverse price effect of having
20 pirated goods out there, the fact that that limits how you
21 might price your other goods, the ones that you are actually
22 able to sell. That effect is hard to separate and take account
23 of.

24 It's also, again, the disruption it does to the
25 business models because it's hard to see what would have

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1 happened, how much more content the copyright holders might
2 have been able to bring to market if they weren't trying to
3 fight pirates, and what quality that content would have been
4 and all of that. So to estimate that is also difficult to do
5 reliably.

6 Q. What's the economic result when legitimate music has to
7 compete with music illegally copied and given away for free?

8 MR. BUCKLEY: Leading.

9 THE COURT: Overruled.

10 BY MR. WARIN:

11 Q. You can answer the question.

12 A. Well, I mean, I think it's pretty obvious that if you're
13 trying to sell a legitimate copy, some of your consumers are
14 going to say it's better to have it for free, and that's going
15 to hurt the sales and your ability to sell the ones that -- you
16 know, and that's going to hurt your profit. It's going to hurt
17 your whole business.

18 Q. All right. So you reached a conclusion, it's one of the
19 opinions you listed in the beginning, that illegal copying on
20 the Internet of copyrighted materials causes harm to copyright
21 holders. Now, my question to you is, is it possible to put an
22 exact dollar valuation on the impact on BMG of file sharing or
23 the unauthorized copying of BMG songs by Cox subscribers?

24 A. No, I don't believe it is. As a general matter, as I've
25 explained, there are lots of different studies and methods that

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1 depend on the data and a bunch of methodological issues that
2 come up that would make it impossible to come up with a single
3 number if you had the data, but if you don't have --

4 Q. I believe there may be a slide that you prepared in
5 connection with this.

6 A. Yeah, there is.

7 But if you don't have the data, you can't do it, and
8 in this case, you fundamentally do not have the data. This
9 slide highlights some of the data problems that make coming up
10 with an estimate of the harm suffered by BMG impossible in this
11 matter.

12 First, there's no data, good data with which to
13 quantify the number of actual illegal copies, infringing
14 uploads and downloads, that the consumers who would otherwise
15 buy legal copies, whether they're Cox subscribers or other
16 subscribers that got it from Cox subscribers, what they would
17 have bought. So you don't know how many copies they got, were
18 out there that they were consuming. What we have is data
19 that's potentially indicative of that, but you don't have a way
20 to actually estimate that.

21 Second, you don't have any data on the behavior of
22 those infringing Cox subscribers or the people they gave it to.
23 You don't know what they would have, what they would have
24 bought and what they would have been willing to pay for if they
25 hadn't been able to consume the illegal, illegal copies. And

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1 in this case, there's just no data on that, and so the only way
2 you come up with that is by making some arbitrary and ad hoc
3 assumptions about consumer behavior to come up with an -- to
4 come up with an estimate that had a reasonable evidentiary
5 foundation that you could then support.

6 Q. All right.

7 A. And then finally, the other -- some of those other
8 effects, the effect on pricing, the business model, those, you
9 know, you just really can't do. There's nothing in the case to
10 allow you really to do that, and so you know that if you left
11 that out, you'd be biasing down whatever, you know, sort of
12 fabricated estimate you could come up with, but, you know, the
13 fact that you don't have the basic data you need and you can't
14 get it in this case means you can't come up with an estimate.

15 Q. All right, thank you.

16 I'd like to switch gears, if I could now. I'd like
17 to talk about Cox, and you've reviewed in connection with
18 rendering your expert opinions here certain documents. You've
19 already identified what they were, certain depositions, etc.
20 What is the business that Cox is in?

21 A. Well, to set the analysis, you first have to have a
22 picture of that. So basically, Cox is a cable television
23 company, and being a cable television company, what that means
24 is they have a cable television, telecommunications network
25 that they've built into the markets that they want to provide

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1 service.

2 Having built that network into those markets where
3 they want to provide service, they then try and sell those
4 services to as many of the households in their serving areas
5 that they serve as possible, and the services they sell are
6 Internet; television, cable television; and telephone services.

7 Q. All right. Approximately how many subscribers does Cox
8 have?

9 A. Cox has approximately 4.5 million subscribers.

10 Q. And approximately how many homes are within the service
11 area of where Cox currently provides the service?

12 A. Cox currently --

13 MR. BUCKLEY: Your Honor, lack of foundation.

14 THE COURT: Lay a foundation.

15 BY MR. WARIN:

16 Q. Have you reviewed data with respect to the number of homes
17 that are in the service area that Cox provides service?

18 A. Yes. I'm sorry. The documents I reviewed included a
19 bunch of stuff that describes how Cox operates and --

20 Q. And --

21 A. -- and the extent of their network and where they operate
22 and that sort of thing.

23 Q. Based upon that, what's your understanding as to
24 approximately how many homes are in the neighborhoods that Cox
25 services?

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1 A. They -- from -- they currently operate in portions of 18
2 different states. So in 18 states, there are areas, serving
3 areas where they've decided to build out network. If you look
4 at the footprint of all those networks and the number of
5 households that those networks cover and are able to serve,
6 that represents about 10 million households, or about 7 percent
7 of the households in the U.S., housing units in the U.S., and
8 that's about -- covering about 7 percent of the population,
9 which is something like 22 million of the U.S. population.

10 Q. All right. How do Cox subscribers pay for their Cox
11 service?

12 A. Well, the subscribers have to live in one of the areas
13 that's served by Cox and within access of their network, and
14 then once they become subscribers of Cox and get hooked up to
15 the Cox network, then they can buy the service, and they buy
16 them on a subscription basis. So depending on what services
17 they buy, and most of them buy several services, so they buy,
18 you know, a mix of the three services, they pay a monthly
19 subscription fee, and they pay that every month for as long as
20 they're a customer of Cox.

21 Q. And I think you testified earlier that the three services
22 that you focused on are Internet, television, and phone; is
23 that right?

24 A. Yes.

25 Q. Are there any other terms that are used either in the Cox

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1 documents or general industry for those three kinds of
2 services?

3 A. Yes. And there are -- the Internet service is sometimes
4 referred to as Internet access service. In some of the
5 documents we'll look at, it's referred to as high-speed
6 Internet or it's abbreviated as HSI, the first three initials.
7 That's the, that's the Internet service. It's also sometimes
8 referred to as broadband.

9 The cable television service is sometimes referred to
10 as the video service or video product, and the telephone
11 service is referred to as the voice product.

12 Q. All right. Dr. Lehr, how is Cox able to provide these
13 services? What's the physical architecture that allows them to
14 do that?

15 A. Well, there's -- the basic core element of this, there's a
16 bunch of electronic stuff, but they need to have wires that run
17 down the streets of -- and past the houses they want to provide
18 service to, and then, you know, so they essentially have to
19 build out a neighborhood and have this network in place, and,
20 of course, they also need to have a marketing establishment, a
21 headquarters, and all that stuff about sort of having the
22 business.

23 But they have these wires that go down all the
24 streets, and then they have to get as many households that are
25 in the serving area that they're serving to sign up for as many

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1 services as they possibly can get.

2 Q. All right. So just so I understand it, if a cable goes
3 down the middle of the street and there's 100 houses on each
4 side, not everybody is automatically signed up, correct?

5 A. No. Not everybody is automatically signed up to Cox,
6 because not everybody buys service, and not everybody who buys
7 service buys service from Cox, because there's other providers
8 in almost all these markets, as far as I know, all these
9 markets, that they could buy service from.

10 Q. All right. So is it -- does Cox face competition in each
11 of the markets they're providing services for?

12 A. Yes. In almost all markets, there's both a cable
13 television provider, which is Cox Communications, and then also
14 the descendant of the telephone company, and that's usually a
15 second market, and the vast majority of markets are covered by
16 at least two wired competitors offering what's called this
17 Triple Play --

18 THE COURT: Lay a foundation for this as we go along,
19 please.

20 MR. WARIN: Fine. Thank you, Your Honor.

21 Q. What economic impact does having more subscribers have on
22 Cox within the markets they serve?

23 A. Well, when you actually look at the data, you'll see why
24 this is the case, but adding additional subscribers, unless, of
25 course, they're subscribers that don't pay, essentially these

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1 are paying subscribers, but paying subscribers is very, very
2 profitable, and so adding each additional subscriber
3 contributes to your bottom line.

4 And so when you -- if you think sort of they first
5 build the network, if they have no subscribers, they have a lot
6 of costs, so they're not going to be profitable. So you need a
7 bunch of subscribers, and then each additional subscriber they
8 get just makes them more profitable.

9 Q. All right. Would that be true in converse with respect to
10 losing customers?

11 A. Yes, because the -- when you think about what happens when
12 you add a subscriber or lose a subscriber, when you add a
13 subscriber, you get the revenue, the subscription revenue from
14 that subscriber, and then you have some additional costs
15 associated with providing service to that subscriber, and the
16 difference between them is the incremental profit that you get
17 from providing service to that subscriber.

18 If you lose that subscriber, you lose that amount,
19 and since that amount is positive, that's like losing
20 something -- you know, you're losing money.

21 Q. You just used the term I want you to define, which is
22 incremental profit. Can you describe or define that for the
23 ladies and gentlemen of the jury?

24 A. So what's of interest in terms of trying to understand the
25 economic incentives of Cox and the benefit Cox gets from the

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1 infringement is to understand how valuable having subscribers
2 is to Cox and adding or losing a few subscribers, what that
3 effect is, and so you want to understand what are the revenues
4 and costs of adding a subscriber because that then gives you an
5 idea of what this effect is.

6 So you're looking for the incremental profit, the
7 increment, increase in profit that's associated with adding a
8 subscriber. So you say, how much revenue do I get on average
9 when I add a subscriber? That's the incremental revenue. And
10 I say, how much cost do I get because I've added that
11 subscriber? That's the incremental cost.

12 And the difference between those two, incremental
13 revenue minus incremental cost, is the incremental profit, and
14 that's one of the key numbers on a per service basis that I'm
15 going to need to calculate.

16 Q. From your point of view, does Cox's incremental profit
17 have any significance to the opinions you're rendering?

18 A. Yes. It's fundamental to establishing the magnitude of
19 the economic incentive they have to tolerate infringing
20 customers on its network and the financial benefit they realize
21 from those subscribers and to establishing the basis for the
22 economic incentives that they have to avoid doing anything that
23 would disrupt their relationship with those subscribers.

24 Q. Have you been able to calculate Cox's incremental profit
25 margin, as you've described it?

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1 A. Yes.

2 Q. All right. Could you tell us how you did that, how you
3 performed this analysis or were able to determine that?

4 A. Well, what I discussed so far about their basic business
5 and this notion of how -- what actually an incremental profit
6 margin is, the key thing is the data. So you need data on the
7 revenues and costs of Cox's services. Now, Cox is a privately
8 held company, so that data is not available in the public
9 domain, but that data was provided for the residential services
10 by Cox.

11 Q. All right. I'd like to have you, if you could, look at
12 the notebook in front of you, Dr. Lehr, and look at PX 1514,
13 which I, believe Your, Honor has already been introduced in
14 evidence.

15 And to remind the Court, this is the one where this
16 document will not be shown on the big screens but will be shown
17 on every individual monitor. They'll be shown down here in
18 front of the jury and on the monitors at counsel table and the
19 Court's table.

20 THE COURT: Okay.

21 MR. WARIN: And yours as well.

22 THE WITNESS: Good. Because I don't have my glasses.

23 THE COURT: If it doesn't show up on your screen,
24 please let me know.

25 THE WITNESS: All right.

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1 BY MR. WARIN:

2 Q. All right. Dr. Lehr, could you tell us what this is?

3 A. Well, this is -- we'll look at the first one, we'll look
4 at the page that refers to the Internet revenues, but I'm going
5 to need to look at both the Internet, the video or television,
6 and the telephone product, and I'll go through the data one in
7 detail, but it's worth looking at the numbers for the others,
8 too.

9 So the first one we're looking at here is this sheet
10 that at the top says "Res Data Product P&L." That's for
11 residential data or Internet service, and this is their product
12 profit and loss statement. So this is a statement that the
13 management uses to understand what the cost and revenue effects
14 are of operating their business, and some of these --

15 Q. You said earlier data was one of the terms that was used
16 for Internet?

17 A. Yes.

18 Q. All right.

19 A. This is the Internet service, and this is prepared by Cox.
20 This is their data. And you'll see that a number of the
21 numbers here are in thousands of dollars, and I'll point that
22 out.

23 What you got, what you have here is you have a series
24 of columns from 2011 to 2014, and that's showing you the
25 historical performance of the data, and then in the most

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1 leftward number column is the 2015 forecast. I'm going to be
2 focusing on the 2014 actuals because those are the most recent
3 year for which we have a full year of actual data, and I don't
4 have to rely on forecasted data, and then on the --

5 Q. So did you rely on 2015 at all?

6 A. No. I mean, I looked at -- I look at everything here to
7 see does this make sense. The format layout of this, this is a
8 very standard kind of presentation of this kind of information,
9 and anybody that looks at these sort of statements would easily
10 understand what this is about.

11 And the different rows are -- at the top are the
12 revenues, and then they break out the costs, and then they show
13 you what -- you know, after they account for different
14 categories of costs, what the final, you know, sort of cash
15 contribution of this business is.

16 Q. You mentioned revenue.

17 A. Yes.

18 Q. So let's have you walk us through the revenue that Cox
19 received in 2014 from its residential Internet service.

20 A. Right. So the first number of interest here is if you
21 look at the total product revenue, where it says 2,838,330,
22 that's \$2.8 billion. So their data service, their Internet
23 service in 2014 produced for them \$2.8 billion in revenues.
24 And when they take that and they divide it by their 4.5 million
25 subscribers, that translates into per revenue per sub, or

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1 subscriber, of \$623.22.

2 So the contribution they're getting from all their --
3 each of their customers that purchases their broadband Internet
4 data service, all the same thing, is \$623.22. That's just for
5 the data service.

6 Q. All right.

7 A. Okay? Now, that's the revenue.

8 Q. That's in the year 2014?

9 A. That's in 2014.

10 Q. All right.

11 A. That's just the revenue, okay? When they deliver that
12 service, they also incur some costs, and those costs for this
13 to make sense for them to add customers, that cost has to be
14 lower. It is lower. It's substantially lower.

15 If you go down where it says "Total Product Direct
16 Costs," when they add up the costs that are directly
17 attributable to subscribers, so they're like the costs, I add a
18 subscriber, I get this cost, don't add that subscriber, I don't
19 get that cost, those numbers, that's \$97 million.

20 So you take 2.8 billion and you subtract 97 million,
21 you end up with product contribution margin which is \$2.7
22 billion. That's the incremental profit contribution.

23 So you divide that by the number of subscribers, you
24 come up with \$601.77. They show us that number here, and that
25 number --

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1 Q. Could you highlight that, please, Karl?

2 A. 601.77, that's the incremental profit contribution per
3 year per subscriber. And if you look at that and you compare
4 the 601.77 and divide it by the 623.22, that gives you a profit
5 margin, incremental profit margin, and that incremental profit
6 margin on their Internet service is 96.6 percent, okay?

7 That is very high, if people have ever looked at
8 these kinds of things, but that's because of the nature of this
9 business. Adding and keeping subscribers is very valuable to
10 these companies and for this Internet.

11 Q. All right. So you've listed what you've called the
12 product direct costs.

13 A. That's right.

14 Q. All right. Does Cox have any other costs other than the
15 costs that are directly associated with adding or losing a
16 subscriber, an individual subscriber?

17 A. Yes. Being in this business is also very expensive.
18 There's a lot of costs associated with keeping a network, you
19 know, the headquarters, maintaining a customer service
20 operation, having marketing, doing national advertising, all
21 that. Those costs, though, are fixed and don't vary with the
22 number of subscribers.

23 You hope when you incur these costs or commit to
24 these costs that you will have a lot of subscribers
25 contributing you a lot of profit. This tells you what actually

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1 happens to them, and if you go down and look at the second
2 column and you go back to the -- where it says "Total Opex,"
3 that's what those costs are, total operating expenses. Those
4 are those other costs, I think that's adding them all up.

5 But when they take off all of their costs, they're
6 saying that they're still getting \$1.7 billion from their data
7 product. They're earning a margin on that product of 59.8
8 percent after taking account of all their costs, okay? And
9 that means they're getting a contribution of \$372.72 per year
10 for these -- taking account of all their costs.

11 This is not -- I'm interested in the incremental
12 profit because I'll be interested in that question about adding
13 and dropping customers, but it's interesting to understand this
14 to understand sort of, you know, the whole business.

15 Q. All right. Now, looking at the second category of costs,
16 it's called operational expenses, do those vary in any material
17 way when a customer is added or a customer is lost?

18 A. No.

19 Q. All right. Do the incremental costs, which were the ones
20 you looked at above, vary when a customer is added or a
21 customer is lost?

22 A. Yes. And that's why Cox has broken them out specifically,
23 because if you're going to analyze this and try and use this
24 information, you want to understand which costs are directly
25 attributable to the product, and so, you know, you almost look

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1 at that revenue number and go, oh, I get that for free. No, it
2 costs you to generate those subscriber revenues, and then that
3 net effect you get helps you pay for all those other costs, but
4 if you don't get those subscribers, you still have all those
5 costs.

6 Q. All right. You just walked us through this fairly
7 detailed sheet with respect to the high-speed Internet service.
8 Have you looked at any other data provided by Cox in terms of
9 rendering your opinions in this case?

10 A. Well, as I explained, because I'm interested in what the
11 value of a subscriber is to Cox, I need to look at the other
12 services also that such a subscriber would purchase, and so I
13 also want to look at the data on the residential cable
14 television service.

15 Q. All right. Have you done that?

16 A. I have.

17 Q. All right. And we've now got on the sheet another page
18 from the materials provided by Cox. Could you tell us what
19 this is?

20 A. This is similar to the page that we talked about for the
21 Internet, but this refers to the video, and so we can go
22 through this faster. The total --

23 Q. Not too fast, Dr. Lehr.

24 A. Okay.

25 Q. Please, walk us through.

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1 A. All right. So if we look at 2014 actuals and you say,
2 well, how much revenue did Cox earn selling video services to
3 its residential consumers? And their billings for that were
4 \$4.2 billion. So higher billings than for the Internet
5 service.

6 And when they divide that by the number of
7 subscribers, every subscriber that's buying the television
8 service is paying on average \$1,034.30 per year, and so
9 Internet service by Internet and this, you're paying for both,
10 but then when you go down and you look and you say, well, what
11 are the costs, the direct product costs that are associated
12 with the video service are also actually quite high. So
13 they're \$2.2 billion.

14 So when you take those off the revenues to get the
15 incremental profit, you get an incremental profit of
16 \$2 billion, which implies a contribution margin of 47.9, which
17 is substantially lower than the 96-point-something percent we
18 saw for the Internet product, but you're still getting an
19 incremental profit contribution of \$495.50, which is a nice
20 amount of money.

21 Q. From your review of the data, why is the incremental
22 profit margin so much higher for the high-speed Internet versus
23 the video or the television?

24 A. Well, with video, in contrast to the Internet service and
25 the telephone service, which is much more like the Internet

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1 service, when you sell video television service, you have to
2 sell the programming, too. Cox incurs substantial programming
3 costs that vary with the number of subscribers. So when Cox
4 sells you, you know, HBO, ESPN, and this sort of thing, they
5 pay ESPN, HBO, because you're a subscriber, and so their
6 programming costs that are attributable to the video service on
7 a per subscriber basis are substantial, and that means they get
8 a lower margin on the video.

9 It's not that it's a bad business. It just means
10 that you add a video subscriber, you add a bunch of revenue,
11 but you also add a bunch of costs. You still make money. You
12 just don't make as much money.

13 Q. All right. Let's just go down just so we're consistent to
14 the bottom, when they -- all the costs are added in. What are
15 the numbers there?

16 A. So if you go to the bottom and they take out all the
17 costs, they're still making \$912 million on their video
18 service, and that means every one of those subscribers is
19 contributing to them per year \$222.79 after they've taken
20 account of all those costs.

21 Q. That's profit?

22 A. That's profit, yes.

23 Q. Let's now go to the phone service.

24 A. Yes.

25 Q. Is there a sheet on the screen in front of you that

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1 displays the phone service data?

2 A. Yes.

3 Q. All right. Could you walk us through that, please?

4 A. So here, if we look at the total revenue, we see for 2014,
5 they call this the telephony product, also sometimes it's
6 called the voice product, we see revenues attributable to this
7 service are \$1 billion, or on an annualized per subscriber
8 basis, \$442.94, and then when they account for the incremental
9 costs that are directly attributable to providing the telephone
10 service to those subscribers, they still end up with an
11 incremental profit margin of \$1 billion, and that margin is
12 97.3 percent, so slightly higher than what they realize even on
13 the Internet service, and they're getting a contribution per
14 subscriber of \$431.06.

15 Q. Okay. So in the profit, as I understand it, per
16 subscriber on the phone service per year is \$431.06 before
17 you've taken into account the fixed cost; is that right?

18 A. Yes.

19 Q. Let's go to the bottom and take into account the fixed
20 cost.

21 A. So when you get to the bottom here, what they're making is
22 \$570 million from their telephone service, and that means each
23 of those telephone subscribers is contributing profits of
24 \$232.67 after taking into account all the costs.

25 Q. All right. Now, have you prepared a slide, because we've

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1 got a lot of data on this page, and have you prepared a slide
2 that summarizes some of the key points that you've gone through
3 now on this?

4 A. Yeah. First, I just want to just look at like -- sort of
5 put these three sheets together, just talk about the top line
6 numbers, and then we can go to, you know, what it takes to
7 actually come up with the value of an individual subscriber.

8 Q. All right. And before we do that, could you tell me why
9 you bothered to look at television and phone as opposed to just
10 high-speed Internet?

11 A. Because what I'm -- the value of having infringing
12 subscribers on the network is the value of having the
13 subscriber, and when you have a subscriber, they typically
14 purchase multiple services from you. So when you attract a
15 subscriber, you'll get multiple services, and if you lose a
16 subscriber, he's likely to leave and take his multiple services
17 to another provider.

18 So you want to -- you need to take account of what
19 the customer -- the average customer actually buys, as opposed
20 to just sort of looking at what would happen if you just looked
21 at the data-related revenue.

22 Q. High-speed Internet?

23 A. High-speed Internet, yeah.

24 Q. So you said -- I interrupted you, and you were about to
25 move on to a slide that summarizes the data from those three

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1 sheets we just looked at.

2 A. Yes. If we could just bring up the next slide?

3 So these are data just presented on one slide that we
4 basically just pulled off those sheets, the bottom line
5 numbers. So remember, I walked us through on the leftmost
6 column the top line revenue numbers. So the Internet was, you
7 know, generating revenue of 2.8 billion, the video 4.2 billion,
8 and the voice 1 billion. So they're capturing -- in their 18
9 states where they have markets, they're capturing revenues of
10 \$8.2 billion.

11 Q. Let me interrupt you a second. And that's for residential
12 customers only, as I understand you?

13 A. Yeah. This is just for residential customers. If -- you
14 know, to the extent they have wholesale business and I know
15 they have some alarm services and they've got some other
16 things, you know, that they -- probably business accounts, that
17 wouldn't be in this data. That would be different.

18 Q. I didn't mean to interrupt. Please continue.

19 A. Sorry. Yeah, I was -- the only data Cox provided would
20 relate to the residential service, so that's all I was able to
21 estimate.

22 The incremental profit that this \$8 billion in
23 revenue produces is \$5.6 billion, and the net profit after
24 taking account of all of their expenses is \$3.2 billion. So
25 these numbers are interesting because it shows sort of the

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1 scale of the operation, and it may -- you know, understanding
2 how this business works. This is a very profitable business.

3 Q. All right. Could we go on now to the value to Cox of an
4 individual subscriber? Have you made some calculations that
5 demonstrate that?

6 A. Yes, I have.

7 Q. All right. Could we move to the next slide?

8 A. So what this slide is showing is the data at the top, this
9 is the data that was actually on those sheets pulled out on a
10 per subscriber basis. So you see, for example, the per
11 subscriber revenue for Internet, \$623.22; for television,
12 \$1,034.30; and then the incremental profits of \$601.77 and so
13 on.

14 Down below, what I've done is I've taken those
15 numbers and divided them by 12 just to put them on a monthly
16 basis because that makes them closer to the kinds of things we
17 actually think about, if you think about what a typical bill
18 looks like. So \$623.22 divided by 12 is \$51.94.

19 So what the lower part is saying is for each monthly
20 subscriber buying the broadband service, that customer is
21 paying in their bill \$52 to pay for the Internet service that
22 Cox is giving them, and that's only costing Cox about \$2 to
23 give them that service additional -- you know, additional
24 beyond the costs they're already incurring, and so they're
25 getting the contribution from having that customer of \$50

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1 per --

2 Q. That's the bottom line in the first column?

3 A. That's right. And you need to calculate that for each of
4 the services, and so these datum are the elements of
5 calculating what the per service contribution margins are.

6 Q. Okay. So you've now gotten the incremental profits per
7 subscriber by each of these lines of business. What did you do
8 with the data after that?

9 A. Well, what I'm interested in is trying to figure out what
10 the value is of the average subscriber. So if you go to the
11 next slide, this is looking at the monthly revenue of a --
12 coming to the monthly revenue of an average subscriber, and the
13 number I'm interested in is the 133.40 down here in this lower
14 right-hand corner.

15 What I'm doing is I'm saying that if you have a
16 broadband Internet subscriber, some of them just buy broadband
17 Internet, and the data indicates that that's like 21 percent or
18 the data I have -- the data we -- 26.6 percent, and the revenue
19 for that subscriber is the \$52 that they get because they're
20 just an Internet subscriber.

21 Q. And on this slide, we're just talking revenue at this
22 point?

23 A. We're just talking revenue, yes.

24 The -- some of those Internet subscribers, 29.8
25 percent of those Internet subscribers also buy a second

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1 service, and they buy cable television, and for those
2 subscribers, the average bill is \$138.13.

3 6.1 percent of the subscribers purchase a second
4 service, and the second service is the telephone or voice
5 service, and they're paying \$88.85, and then 43.5 percent of
6 the subscribers actually purchase all three of the services
7 from Cox, and they're paying \$175.04.

8 Q. All right. So would that be, if I'm a Cox subscriber, I
9 got to get all three, high-speed Internet, video, and voice,
10 would that be a typical or average monthly bill that I'd get
11 for those services?

12 A. That would be a typical average bill. And what's, you
13 know, when you buy these services -- buy more than one service,
14 there are benefits to both Cox and the subscriber. For Cox,
15 it's less costly for them to sell you an additional service
16 because they've already got a billing relationship with you,
17 etc. So the more service they can sell you, it's good business
18 for them. Also, you know, you're less likely to churn. It's
19 easier to hold onto customers that buy multiple services by
20 you.

21 Q. I don't know what you mean by "churn." Tell me what you
22 mean.

23 A. Sorry. Churn is the rate at which customers leave you.
24 So, you know, when you're trying to hold onto customers and
25 keep them from going to a competitor, you want to reduce churn,

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1 and so customers that you're able to sell three services to
2 are, you know, harder for a competitor to steal away. They're
3 harder for you to get, too, but they're more valuable.

4 Q. Now, it mentions bundle distribution. What's that mean?

5 A. Well, what I mean is that they -- this is the different --
6 the share of customers that just purchased one service or two
7 services or three services. The advantage -- the other thing
8 is the advantage to the consumer is that when you buy services
9 bundled, you pay less.

10 The revenues we've looked at reflect those bundle
11 discounts. So if you were to go and, say, buy a la carte each
12 individual thing, you'd pay more. Like in a restaurant, if
13 you, you know, get the three courses as opposed to individual
14 courses, it's that same kind of deal. And then, of course,
15 you're only dealing with a single customer relationship. So if
16 you have a problem, you call one number and hopefully they can
17 sort it out instead of having to call three different
18 providers.

19 But when you weight average, those numbers on the far
20 right, which are the price that a typical person in each of
21 those bundles would pay on average, you come up with what the
22 average customer pays, so the average customer is contributing
23 to Cox \$133.40. That's what the data says is your average
24 bill.

25 Q. All right. Just so I understand it, though, at this

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1 point, you've only talked about revenue. Do you have a slide
2 that takes into account --

3 A. Yes.

4 Q. -- incremental cost of those services?

5 A. Well, it reflects it. If we go to the next slide, the
6 next slide looks at the incremental profit. So remember on
7 that slide where I showed you here are those core numbers and I
8 said there was \$52 for the Internet, but then \$50 was the
9 incremental profit because it has a 96 -- 97 percent margin?
10 Well, these numbers over here are reflecting -- these are the
11 contribution margins.

12 So when you weight them using the same weights for
13 the bundles, you come up with the blended average incremental
14 profit for the average subscriber, and the -- so that's -- so
15 what this is saying -- what these two slides are saying is the
16 average customer has a bill of \$133 per month, and the
17 incremental profit that flows to Cox's bottom line by having
18 those subscribers is \$98.23, or almost \$100. So if they get
19 another subscriber, that's worth to their bottom line an
20 additional \$100, and if they lose that subscriber --

21 Q. Per month.

22 A. Per month, per month.

23 Q. All right. Now, the bottom line, though, says Average
24 Profit Per HSI Subscriber. And you said that was high-speed
25 Internet, but this seems to include more than just high-speed

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1 Internet. Can you explain?

2 A. Because the average Internet -- the average subscriber to
3 the high-speed Internet service buys more than one service, so
4 the bills -- they also pay -- there's also different tiers of
5 service. So, you know, there are some consumers -- there are
6 some number of Cox subscribers that buy the lowest tier
7 service, some that buy more expensive, and some that buy the
8 most expensive one.

9 Cox did not provide data on the breakout of their
10 subscribers by billing tier or by usage.

11 Q. All right. Now, this is all, and it says it at the top of
12 your slide, 2014 monthly incremental profit.

13 A. Yes.

14 Q. Did you do anything with this number to determine the
15 longer-term value of a Cox customer based upon 2014 data?

16 A. I assume that this was a reasonable forecast of the future
17 because I didn't have additional data to make adjustments.

18 Q. All right. Did you make a slide on that?

19 A. I didn't make a slide on that, but what I did do is this
20 is only the value. What this slide is is what's the value of a
21 subscriber to Cox, because what I talked about there was an
22 individual subscriber is a subscriber of Cox for multiple
23 months. So it's not like they get a subscriber, they get one
24 month's bill and that's it. No, they get a hundred bucks a
25 month for the average subscriber, and that goes on for as long

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1 as the subscriber is a Cox customer.

2 And the data shows that the typical customer stays
3 with Cox for 67 months, or 5.6 years. So if you think about
4 100 bucks a month per subscriber over 12 months, that's \$1,200
5 contribution to their bottom line in the first year. Second
6 year it's another 1,200 bucks, third year it's another 1,200
7 bucks. If we did that over six years, that 7,400 bucks in
8 aggregate.

9 But if you say what would I pay today, what's the
10 value today of a stream of revenues that takes place over time,
11 those revenues that happen in later years are less valuable, so
12 I discount those back. This is a standard calculation when you
13 try to evaluate money flows that take place over time. It's
14 calculating the present value of the stream, monthly stream of
15 payments.

16 If you discount that stream of monthly payments at a
17 discount rate of 8 percent over the life of the typical
18 customer, you come up with the customer's value, the lifetime
19 value, what -- what's going to be contributed to the value, and
20 that estimate is \$5,294.

21 Q. All right. Is a calculation like this used at all in
22 business transactions or economics?

23 A. Yeah. This is very standard because you're trying -- you
24 know, again, if someone said compare, compare the hundred
25 dollars a month to what a subscriber is worth, you'd say, no,

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1 because I'm going to get a hundred bucks the next month, the
2 next month, the next month, and the next month for 67 months.
3 The value of that is \$5,294, and that's the value of a
4 subscriber to Cox.

5 So when they say, I'm going to go -- you know, what
6 is it worth if we can keep a subscriber or attract a subscriber
7 to our network, it's \$5,294.

8 Q. All right. How do BitTorrent users compare to the average
9 subscribers in terms of profitable?

10 A. Well, the evidence suggests that BitTorrent users are
11 likely to be more profitable because the BitTorrent users are
12 more likely to be, for example, purchasing the higher-tier
13 broadband services. I was here earlier today and we saw some
14 data from, I guess it was Mr. Negretti. Some of that data I'd
15 seen also, but basically what that talked about was the data
16 utilization of file sharing, and customers that are engaging in
17 infringing, they're doing those services, and they need more
18 data. They need higher data caps.

19 With the lowest data cap, you can't do what they're
20 saying a lot of their customers were doing. If you're a heavy
21 downloader, you would need to buy a higher, more profitable for
22 Cox, higher-tier service. So it's likely that the average data
23 that I'm working with is a lower bound on the value of a
24 subscriber who's infringing.

25 Q. All right. You mentioned some data you saw today earlier

W. Lehr - Direct

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1 when Mr. Negretti's testimony was read. Could I refer you to
2 PX 1412?

3 Which I believe is already in evidence, Your Honor.

4 A. Yes, this is one of the things that I had looked at
5 before.

6 Q. Was that something you referred to just now in your
7 testimony?

8 A. Yes.

9 Q. I'd like to direct you to page 5 on that. And this
10 particular page is captioned "Online Activity Summary"?

11 A. Yes.

12 Q. Do you see that at the top? All right.

13 And I'd like to ask you if there's any particular
14 line in here that was relevant with respect to any of the
15 opinions you're rendering here today?

16 A. Well, all of this is interesting because it shows that,
17 you know, Cox is paying attention, which is hardly surprising,
18 to what their customers want today and are doing, because it's
19 in the business of keeping its customers happy so they can keep
20 them and continue to make money on them.

21 But the most interesting line on this is the fourth
22 line from the bottom, where it says "P2P BitTorrent," and this
23 is saying that the customers -- that this survey that was done
24 for Cox looking at the behavior of their customers, that their
25 typical customer was spending 21 hours per month on BitTorrent

W. Lehr - Direct

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1 and using, like, 1.44 gigabits per hour. If you take 1.44 and
2 multiply it by 21, you get, you know, enough so that you can't
3 buy, like, the lowest tier. And this is, again, just an
4 average.

5 And we know from other evidence that when it says
6 BitTorrent, you can effectively say BitTorrent equals
7 infringing traffic.

8 Q. All right. Well, you mentioned you know from other
9 evidence that BitTorrent equals infringing traffic. What are
10 you referring to?

11 A. Well, for example, there's a number of studies. There
12 were two, two studies in particular that, that were widely
13 cited in the industry and used by a lot of folks. There was a
14 study in 2011 by Envisional and a study in 2013 referred to as
15 the NetNames study, and that was essentially a repeat of the
16 2011 study, and of those two studies, you looked at -- you
17 know, they were sort of the most substantial published publicly
18 available studies analyzing what's actually in BitTorrent
19 traffic, and so what they looked at was they -- the 2011 study
20 looked at something like almost 3 million torrents on the
21 largest public site that shows you what, you know, what's in
22 these files and then analyzed those, analyzed the top 10,000
23 files in those, and, you know, it found that, like -- something
24 like 99.9 percent of the content, the media content in those
25 files and in those torrents was infringing content.

W. Lehr - Direct

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1 And what was surprising in the 2011 study was of the
2 music files that they identified in the content, 100 percent,
3 all of them were infringing, and when they did the study in
4 2013, they found that, I think, the total composition of
5 infringing content was like 99-point-something.

6 So -- and -- so, A, they did the test two different
7 times, you know, with two years and lots of people able to
8 weigh in and sort of say, you know, does this make sense, and
9 they came up with essentially, you know, that traffic is almost
10 all infringing, and they also found that the traffic had
11 increased, that the number of peers that were involved had
12 grown and that the number of infringing matter and infringing
13 content had grown and, you know, that's -- that might -- I
14 mean, you know, that's not surprising when you understand that
15 the -- a number of broadband subscribers worldwide and their
16 ability to access high speed and having the devices and take
17 advantage of the Internet has also grown.

18 So the fact that it's grown, you know, makes sense,
19 but that's what those studies show.

20 Q. All right. Are these studies that you were familiar with
21 before you began your work on this case?

22 A. You know, I was -- yes. I was generally familiar with
23 them, yes.

24 Q. Are these studies that are generally relied upon by
25 economists like yourself doing these kinds of things?

W. Lehr - Direct

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1 A. Yes. I mean, this kind of work, you know, you'd be
2 interested in this sort of data, and then there are other
3 studies like this that have similar results. It was pretty
4 much common knowledge amongst folks that, you know, most of the
5 BitTorrent traffic was likely to be infringing, but until
6 someone goes out and actually measures it and does it in a way
7 that people can say okay, yep, they did it that way, all right,
8 yep, I believe those results, you're not necessarily going to
9 feel confident. That's just saying it's most of it. You know,
10 you want to know what the numbers are. Seeing the numbers as
11 high as they are, that was potentially surprising.

12 MR. WARIN: Your Honor, may we approach for a moment?

13 THE COURT: Yes, sir.

14 (Sidebar on the record.)

15 THE COURT: Yes.

16 MR. WARIN: Your Honor, these are the much talked
17 about Envisional studies.

18 THE COURT: Right.

19 MR. WARIN: He's testified to his use of them and the
20 fact that they are widely respected and used. We think this
21 falls within the compilation description.

22 THE COURT: Certainly 703. Do you want, actually
23 want them admitted under 803(17)? Do you believe they're --

24 MR. WARIN: Yes, I do.

25 THE COURT: Where do they fit in in (17)? Just

W. Lehr - Direct

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1 market studies?

2 MR. WARIN: Yeah, market studies. And that's what we
3 hang our hook on, (17).

4 THE COURT: Okay.

5 MR. BUCKLEY: Your Honor, it's the same objection as
6 we've had. He's talked about them to the extent he relied on
7 them. We've now had an expert saying BitTorrent equals
8 infringement, but I don't know that that particular conclusion
9 really relates to his opinion, which is that subscribers are
10 valuable, and so I don't know that the reports need to come in,
11 and they have all of the same reliability, and, you know,
12 they're embedded expert opinions that haven't been verified.

13 THE COURT: This is right in Dr. Lehr's wheelhouse.
14 This is what he does on a regular basis as a professor and
15 studying economic effects of influences on the Internet, and he
16 deals in the economic world, so he's the first one that I
17 thought had a right to come in and say yes, this is used in the
18 industry, I'm familiar with it, and the rest of his testimony
19 talked about the reliability. So your exception is noted, but
20 I'm going to admit the documents.

21 MR. WARIN: Thank you, Your Honor.

22 THE COURT: Thank you.

23 MR. BUCKLEY: Thank you.

24 (End of sidebar.)

25 BY MR. WARIN:

W. Lehr - Direct

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1 Q. Dr. Lehr, in the notebook in front of you, you have an
2 exhibit that's been marked PX 2429. Can you take a look at it?

3 A. Yes.

4 Q. Tell us what it is.

5 A. This is the Envisional 2011 report I was describing in my
6 testimony.

7 MR. WARIN: All right. Your Honor, I'd like to move
8 admission of this it document.

9 THE COURT: It's received, and your exception is
10 noted.

11 MR. BUCKLEY: Thank you.

12 MR. WARIN: Thank you, Your Honor.

13 BY MR. WARIN:

14 Q. I'd like to refer you, if I could, Dr. Lehr, to page 5 of
15 that, and I'd like you to look down at the third bullet on the
16 right-hand side. Could you read into the record that statement
17 that begins with 2.9 percent?

18 A. Yes. It says, "2.9 percent was music content -- all of
19 which was copyrighted and shared illegitimately."

20 Q. That was talk about BitTorrent traffic; is that right?

21 A. This is -- yes, this is the share of the BitTorrent
22 traffic.

23 Q. All right. I'd like to have you, if you could, look at
24 the DTX 0308, could you tell us what this is?

25 A. This is the 2013 study that I was referring to.

W. Lehr - Direct

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1 Q. And were these studies prepared by the same people
2 generally?

3 A. Yeah. I don't know exactly -- there was a relationship
4 between them, and they were sort of a repeat. I don't know if
5 all the individuals were the same.

6 MR. WARIN: All right. Your Honor, I'd like to move
7 the admission of DTX 0308.

8 MR. BUCKLEY: Same objection.

9 THE COURT: All right, it's received. Your exception
10 is noted.

11 BY MR. WARIN:

12 Q. All right. Turning back to Cox for a moment, if you
13 could, and I'd like you to focus on Cox incremental profits
14 from repeat infringers. How do those relate to Cox's economic
15 incentives with respect to subscribers' infringement of BMG
16 works at issue in this litigation?

17 A. Well, to -- you know, it's central to estimating and
18 understanding the -- and quantifying the value to Cox of having
19 infringers on its network. So the value of having a
20 subscriber -- the average value of having a subscriber to Cox
21 is \$5,284 -- roughly \$5,000, over \$5,000, and, you know, if
22 they have a subscriber and they lose that subscriber, that's
23 worth \$5,000 to them, and the evidence that I've seen shows
24 that they have indeed infringing subscribers on their network,
25 and so they're benefiting from those infringing subscribers to

W. Lehr - Direct

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1 the tune of \$5,000 per infringing subscriber.

2 Q. What would happen with respect to loss of those?

3 A. They would lose \$5,000 if they were to lose those
4 subscribers, and so those numbers speak directly to their
5 incentives to tolerate infringement on their network or to
6 avoid taking actions that would significantly disrupt their
7 relationship with those subscribers, and, you know, from Cox's
8 perspective, the worst case would be if they lost those
9 subscribers.

10 Q. All right. What are the implications of Cox's economic
11 incentive for BMG's ability to address infringement of its
12 works by Cox subscribers?

13 A. Well, if Cox doesn't participate in trying to deter the
14 infringers, there are other things that a BMG or copyright
15 holders can do, but they're all very expensive and they don't
16 work very well. So, for example, they've tried -- the industry
17 copyright holders have tried doing things like digital rights
18 management, implementing, you know, complicated encryption
19 strategies, and those haven't worked very well and have been
20 very expensive and been largely perceived to be a failure in
21 the marketplace.

22 They can also try and sue individual subscribers. Of
23 course, they have to figure out who are the actual individuals
24 that are infringing, and Cox's help in that is critical.

25 Q. And why is that?

W. Lehr - Direct

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1 A. Because the --

2 MR. BUCKLEY: Your Honor, scope and foundation.

3 THE COURT: Yeah, lay a foundation as to how he knows
4 what information -- the standard questions about how you get to
5 the actual name of the subscriber.

6 MR. WARIN: The subscriber.

7 Q. Who knows the identity of the individual subscriber?

8 A. Cox knows the identity of the individual subscriber
9 because what's, what's observable in, for example, the
10 BitTorrent data or the illegal file uploading activity is the
11 files that are getting moved and the IP addresses from whence
12 they're coming and to whence they're going, but the mapping of
13 those IP addresses to individual subscriber addresses, that's,
14 that's what Cox knows because Cox assigns those addresses, and
15 it's the one that maintains a relationship with those
16 subscribers.

17 Now, there potentially are other ways that BMG might
18 be able to identify some subset of illegal subscribers and then
19 go and sue them directly, but in going to sue them directly,
20 that -- versions of that have been tried by folks, and it's
21 just economically not viable. You know, that's thousands of
22 infringers and thousands of cases. It's just too expensive.

23 Q. How about suing BitTorrent?

24 A. Well, you can't sue BitTorrent because it's a protocol.

25 MR. BUCKLEY: Your Honor, could we have a sidebar,

W. Lehr - Direct

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1 please?

2 THE COURT: Yes, sir.

3 (Sidebar on the record.)

4 MR. BUCKLEY: Not a word of this about John Doe
5 lawsuits and suing BitTorrent and all that was in his report.
6 He never opined about any of this. So the economic incentive
7 arguments were they're valuable, they pay more for high-speed
8 Internet, not that it's going to cost them more to go out and
9 do it another way. That's the first time he's opined of that.

10 THE COURT: Well, go ahead, Mr. Warin. Well, I think
11 Mr. Theodore has been kind enough to hand me -- paragraph 45.

12 MR. WARIN: 45.

13 MR. BUCKLEY: Is this the opening report?

14 MR. THEODORE: Yes.

15 MR. BUCKLEY: This is the public policy stuff you
16 struck.

17 THE COURT: Well, you're trying to identify how the
18 impact of the market and what infringement does to copyright
19 holders, and when you're looking for relief, which I think that
20 he's certainly qualified to talk about, you know, you have
21 asked questions about, you know, couldn't you sue the
22 subscriber and John Doe lawsuits and -- so I think it's fair
23 game for him to be able to say you can't sue BitTorrent. I
24 know there was some testimony about it earlier, and I can't
25 remember what that testimony was about BitTorrent. Do you

W. Lehr - Direct

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1 remember when it came up earlier?

2 MR. WARIN: I think that Ms. Frederiksen-Cross
3 described that BitTorrent was a protocol.

4 MR. BUCKLEY: Yeah.

5 THE COURT: I'm going to allow it. Your exception is
6 noted.

7 MR. BUCKLEY: Thank you, Your Honor.

8 (End of sidebar.)

9 BY MR. WARIN:

10 Q. Dr. Lehr, I'll repeat the question I asked just before we
11 took a break. What about suing BitTorrent?

12 A. BitTorrent is a protocol, so you can't sue that. You
13 might be able to sue companies that write the programs that
14 users get to actually implement the protocol, but there's lots
15 of those, and they're relatively easy to write. So there would
16 be, like, a Whac-A-Mole problem.

17 You could also possibly consider suing things like
18 PirateBay or the sites that host these torrents, but again,
19 that's the Whac-A-Mole problem because they're easy to
20 replicate and, you know, someone offshore or wherever could
21 host them. So it's just impractical. It's economically
22 impractical.

23 Q. How do these other alternatives that you've just described
24 relate to Cox's economic incentives to combat privacy?

25 A. Well, Cox is benefiting from the piracy, and the fact that

W. Lehr - Direct

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1 there's no practical way to deter it just means that, you know,
2 more of this activity goes on, more subscribers who want to do
3 this can become Cox subscribers and do this, in addition to the
4 other things they may want to do on the Cox network, but it
5 helps them, you know, they're making profits, keeping their
6 customers happy, and clearly doing this file downloading is
7 something their customers are regularly doing and wanting to
8 do.

9 Q. All right. I think you testified a moment ago that the
10 average value of a Cox subscriber was approximately \$5,000?

11 A. Yes.

12 Q. If there were evidence in this case that indicated there
13 were approximately 60,000 Cox subscribers who were repeat
14 infringers of BMG works, how would that affect Cox's direct
15 economic benefit in keeping those subscribers?

16 A. Well, as I explained, the 5,294 estimate is a value of a
17 subscriber, and so if you said, well, that's roughly \$5,000
18 that they're getting for each of the -- that that's the value
19 of each of those subscribers, so having 60,000 subscribers
20 times 5,000, that's \$300 million. So that's -- you could say
21 that's the financial benefit that Cox is realizing because it
22 has those infringing subscribers on its network.

23 Q. Do you have an opinion as to whether Cox has a substantial
24 incentive, economic incentive to tolerate infringement?

25 A. Yes. I think the evidence amply supports that.

W. Lehr - Cross

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1 MR. WARIN: No further questions, Your Honor.

2 THE COURT: All right. Mr. Buckley?

3 MR. BUCKLEY: Yes. Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. BUCKLEY:

6 Q. Good afternoon, Dr. Lehr.

7 A. Good afternoon.

8 Q. We haven't met. My name is Brian Buckley. I'm one of
9 Cox's attorneys.

10 You testified on direct, Dr. Lehr, about your
11 credentials and other cases that you've been involved in, your
12 expertise; is that right?

13 A. Yes.

14 Q. This is the first copyright case you've consulted in,
15 right?

16 A. It's certainly the first case that specifically -- well,
17 no, it's certainly the first case where the focus is on
18 copyrights. Whether or not copyrights were involved in other
19 matters I've been involved in, they probably were. I've
20 certainly been involved in other intellectual property matters.

21 Q. Is this the first copyright case you've testified in?

22 A. Yes. I think that's right, yes.

23 Q. Do you consider yourself to have any specific expertise in
24 copyright issues?

25 A. Yes.

W. Lehr - Cross

1108

1 Q. Can you describe what that is?

2 A. Well, I think understanding the economics of the industry,
3 the digital media industries and the infrastructures by which
4 they provide those services, all of that is of relevance.

5 Q. But you don't have any expertise specifically with the
6 Copyright Act, correct?

7 A. Sorry, the Copyright Act?

8 Q. Yeah.

9 A. Specific? I'm generally familiar with it, and, and -- but
10 I'm not here offering any legal opinions about it.

11 Q. How about the Digital Millennium Copyright Act?

12 A. No, I'm not offering any legal opinions about any of that.

13 Q. Are you an expert on BitTorrent?

14 A. I'm -- as an economist, I think I know quite a bit about
15 the economic implications of it, but I'm not here testifying as
16 a technical expert on BitTorrent, but I generally understand
17 how it works and that sort of thing.

18 Q. But you're not offering expert opinions about the
19 operation of BitTorrent?

20 A. No.

21 Q. And I believe that you said on direct that BitTorrent
22 equals infringement. Do you remember saying that?

23 A. Yeah. That was, that was perhaps sloppy shorthand. What
24 I was saying was that when you see a bunch of traffic that is
25 BitTorrent traffic, the evidence suggests that it's a

W. Lehr - Cross

1109

1 reasonable inference that most of the traffic you're seeing
2 there is, in fact, infringing traffic, and the reason that's a
3 reasonable inference is because there have been a number of
4 studies that show that that indeed is the case, and to my
5 knowledge, there's never been a single study that makes the
6 counterargument, in other words, that most of the traffic is
7 not infringing. I've never heard anything like that from
8 anybody.

9 Q. Okay. But you didn't mean that statement literally. You
10 didn't mean all BitTorrent traffic is infringing, right?

11 A. No, I did not mean that literally. That's why I tried to
12 clarify it right now.

13 Q. That's why you described it as sloppy.

14 A. Yes. I'd say like 90 --

15 Q. Just answer my question, please.

16 A. Sorry.

17 Q. I mean, that -- implicit in that is there are certain ways
18 to use BitTorrent that aren't infringing, right?

19 A. Oh, yes. It's a peer-to-peer sharing program, and it
20 would be possible to use it in ways that are non-infringing.
21 It's just that the evidence of residential subscribers is that
22 that's not what they're using it for.

23 MR. BUCKLEY: Okay. Move to strike.

24 Q. My question was are there ways to use BitTorrent that are
25 non-infringing?

W. Lehr - Cross

1110

1 A. Yes.

2 Q. So one of the calculations that you went over at some
3 length with Mr. Warin was the profit margin; is that right?

4 A. Yes.

5 Q. Profit margin?

6 A. Yes.

7 Q. And you've referred to that sometimes as contribution
8 margin?

9 A. Yes.

10 Q. For the purposes of your opinion, are contribution margin
11 and profit margin the same thing?

12 A. Well, I talked about several different things. I was
13 talking about incremental contribution margin, incremental
14 profit margin, and in the purpose of my testimony, those two
15 things are the same.

16 Q. Okay. And I believe -- and correct me if I'm wrong, but I
17 believe you said contribution margin is equal to revenues less
18 variable costs; is that right?

19 A. Yes.

20 Q. And you've calculated Cox's contribution margin for
21 high-speed Internet to be almost 97 percent?

22 A. Yes. That's consistent with data I've seen estimated for
23 other providers for which there is publicly available data, you
24 know, by folks on Wall Street, that kind of thing.

25 Q. Would you agree, Dr. Lehr, that that does not include all

W. Lehr - Cross

1111

1 of Cox's incremental costs?

2 A. I'm not in a position to question -- I wouldn't agree with
3 that because the data that Cox provided identified the
4 incremental costs, and that gave me that margin. And it's
5 plausible to me that, indeed, those margins are that high and
6 that it could include all -- indeed, include all the
7 incremental costs, but I wouldn't try and second-guess Cox's
8 own data on that.

9 Q. And you're aware that Cox's economic expert, Dr. Sullivan,
10 included a number of costs in his profit calculation that you
11 didn't include; is that right?

12 A. Dr. Sullivan included a lot of not -- costs that were not
13 incremental to adding subscribers in his analysis, and, you
14 know, I, I took exception with that when I reviewed his
15 analysis and, you know, prepared the reply comments.

16 Q. Okay. So he included costs associated with service
17 technicians to install customer modems, for example. Did you
18 include those?

19 A. Well, as incremental costs, yes, because if you look
20 actually on that sheet, what you see is you see certain line
21 items that are network costs. So, for example, you need to
22 have a certain number of technicians to operate a network, and
23 you need to have a certain amount of outside plant staff that
24 doesn't vary directly with the number of subscribers you have,
25 and so there's some variation potentially in what you need to

W. Lehr - Cross

1112

1 do in terms of staffing of your outside plant management that
2 varies with the number of subscribers, and presumably to the
3 extent that there is such a cost, it's in those direct costs,
4 and when you amortize those kind of costs over the portion
5 that's -- which would be small, but you amortize it over the
6 lifetime of a customer and account for it the way it is, it
7 would be in the direct costs.

8 I assume that's what Cox did because that's what you
9 do when you do a profit and loss statement like that.

10 Q. Okay. But that's a different way of saying you assumed
11 that was in the number from Cox that you relied on?

12 A. No. I read Cox's own statement where it says their
13 product direct costs, and I counted their product direct costs.
14 I did not try and second-guess and say if Cox had accounted for
15 their data differently, the costs would have been different.
16 If they had meant that and given me the information or said
17 that, I'd have considered that.

18 But to look, for example, at the numbers that
19 Dr. Sullivan uses and says those are incremental costs, that
20 would just be dead wrong. That would be a gross overestimate
21 of the incremental costs that are associated with the service,
22 and I would think that would be improper analysis of the data.

23 Q. Okay. So it's possible that I misunderstood your
24 calculations. So your calculations and your incremental cost
25 calculations do include operational costs like service

W. Lehr - Cross

1113

1 technicians, customer service representatives?

2 A. To the extent those vary with -- when I add an additional
3 subscriber to the margin, like I -- you know, they would be in
4 there presumably, and if they're not, it's because Cox doesn't
5 think they're variable, and so I wouldn't have included them
6 appropriately. I was using the data Cox gave me.

7 Q. Okay. But you are aware that Dr. Sullivan came up with a
8 significantly lower profit margin, right?

9 A. I'm well aware of that. The problem with him is basically
10 he will seem to be throwing everything into the kitchen sink
11 that he could to say these are costs that relate to a
12 subscriber, and, you know, I don't think that's appropriate,
13 but even if -- if you look at it, it's still, they are still
14 immensely profitable subscribers, but I don't think that's
15 appropriate. Those are not the incremental costs.

16 What he throws in are not costs that would vary.
17 They are costs Cox would still have whether it had those
18 subscribers or not.

19 Q. You used the -- your calculation of profit margin to come
20 up with your lifetime subscriber value, right?

21 A. Of course, yes. I used what I believed to be the correct
22 estimate, yes.

23 Q. And your lifetime subscriber value, you testified a bit
24 about it, is based not just on Internet revenue, right?

25 A. It's a value of the subscriber, and the value of the

W. Lehr - Cross

1114

1 subscriber is not just the Internet revenue you get from that
2 subscriber; that's true.

3 Q. All right. So it includes the revenue that Cox gets for
4 telephone services, right?

5 A. From the subscriber who was an Internet subscriber, yes.
6 It doesn't include the revenue that Cox gets from telephone
7 subscribers that aren't Internet subscribers.

8 Q. Okay. And the same thing for subscribers who have cable
9 service?

10 A. Again, it's an Internet subscriber. If they also purchase
11 video services, then those revenues would be appropriately
12 attributed to the value of that subscriber.

13 Q. Did you do a lifetime subscriber value calculation that
14 was just isolated to Internet services?

15 A. I think that table -- in my report, I did calculate that
16 number just to sort of see what it was, but I don't think it's
17 the relevant number. You could do that. You could sit there
18 and say -- essentially, you're asking the thought experiment,
19 so it's a hypothetical. You say supposing all of Cox's service
20 customers, all they bought was Internet and they were happy,
21 that was just Internet, so all they were paying was 52 bucks a
22 month. So those subscribers were not getting any TV or
23 telephone. That's a strange hypothetical. But were you to
24 look at that number and run it out, you'd come up with a number
25 that was several thousand dollars but less than \$5,000.

W. Lehr - Cross

1115

1 Q. And you believe that calculation is in your tables
2 somewhere?

3 A. It was in my original report.

4 Q. Dr. Lehr, is the -- part of the point of your lifetime
5 value subscriber calculation is that subscribers are profitable
6 for Cox, right?

7 A. Well, I think that's kind of self-evident because they
8 wouldn't add subscribers if they didn't think they were
9 profitable. It's a question of how profitable. You have to
10 understand how valuable they are, and it's an effort to
11 quantify them, and to quantify them, you need to do what I did.

12 Q. Right. So you're not here as an expert just to tell the
13 jury that profit is good?

14 A. No.

15 Q. And that profitable customers are good?

16 A. No. I mean, I think I'm trying to explain the context
17 within the context of a cable provider like Cox operating and
18 what's the value they derive in this business and how it
19 relates to the other facts in this case. I think there's a lot
20 of, you know, other issues that come on. So no, it's not just
21 that customers are profitable.

22 Q. And it's your opinion that because the value for a single
23 subscriber is \$5,000 or I think you said \$600 per year is one
24 of the figures you used, that because a subscriber is
25 profitable at that level, then Cox has an incentive to retain

W. Lehr - Cross

1116

1 that subscriber?

2 A. Yes. That's part of what I was saying, yes. And again,
3 you know, it relates to what is the, you know, the level of --
4 what's the financial benefit they're getting from
5 participating -- you know, tolerating infringement on their
6 network.

7 Q. Right. But you didn't do any calculation that took into
8 account the number of infringers on Cox's network, right?

9 A. No. I'm not -- I didn't -- I just provided some
10 illustrative numbers of how these numbers would be used in my
11 original report, and at the end of my testimony, I provided an
12 illustration of how you might use those numbers and what you
13 might reasonably infer from them.

14 Q. Right. Because you don't have any -- you're not aware of
15 any evidence of actual infringement by any Cox subscriber,
16 right?

17 A. Well, I'm not -- I think there's been substantial evidence
18 and some of the testimony I've heard suggests that Cox
19 subscribers are using BitTorrent substantially and that
20 BitTorrent traffic is substantially -- contains infringing
21 traffic, but what specifically constitutes an infringement, I'm
22 not offering a legal opinion about that, but that that --
23 there's a lot of activity going on by Cox subscribers,
24 uploading, downloading illegal content. I think there's lots
25 of evidence in this case that I've heard and considered.

W. Lehr - Cross

1117

1 Q. Okay. But my question was are you aware of any evidence
2 of any infringing activity by a particular Cox subscriber?

3 A. Oh, you mean do I know an individual Cox, like a person,
4 like Joe? No.

5 Q. Do you know how many alleged infringements are at issue in
6 the case?

7 A. As I sit here right now, I don't remember. I think I was
8 in the room the other day and there was some discussion of
9 this. I know there was some discussion of the number of
10 notices, for example, that some subscribers had, and I think,
11 like, there was one for two years the guy had gotten 28 notices
12 and stuff like that, you know, and was, you know, presumably
13 running BitTorrent over a lot of that time. So that would be a
14 lot.

15 Q. Do you know how many infringements are at issue?

16 A. As I sit here right now, I don't.

17 Q. And you don't have any -- you're not offering any opinions
18 about the Rightscorp system or the Rightscorp data, right?

19 A. No.

20 Q. Do you know what BMG's copyrights that they're asserting
21 in this case are worth?

22 A. No, I'm not -- I didn't value their copyrights.

23 Q. Do you have any information about the revenue that the
24 plaintiffs receive from their copyrighted works?

25 A. No. I mean, I -- you know, no, I don't.

W. Lehr - Cross

1118

1 Q. Did you ask for any of that information?

2 A. No, because I don't think if I had had that, it would have
3 factored into my analysis. It wasn't something I needed for my
4 analysis.

5 Q. But you didn't ask to see any revenue data?

6 A. I did not.

7 Q. For BMG?

8 A. For BMG, no.

9 Q. Is there anything that you asked for from BMG, any data
10 that you asked for as part of your work that you didn't get?

11 A. No, I don't believe so.

12 Q. In your reply report, Dr. Lehr, you stated, do you
13 remember, "My analysis does not hinge on the specific works
14 infringed or the specific copyright holders harmed"? Do you
15 remember saying that?

16 A. That's right.

17 Q. Is that still true?

18 A. Yes, because I don't believe you can estimate, as I
19 explained, what the harm is actually to the individual right
20 holders of BMG. So even if I had had the information, for
21 example, about BMG's revenues, I still wouldn't have had the
22 data about the actual number of files uploaded and downloaded,
23 so I wouldn't have been able to calculate -- that would have
24 been one of the reasons why, there were other reasons, I
25 wouldn't have been able to calculate what the effect was on

W. Lehr - Cross

1119

1 BMG, and so since I couldn't calculate what the effect was on
2 BMG, I didn't -- you know, it didn't matter for what I was
3 opining about of what the specific rights were that BMG had
4 that were alleged to be infringed.

5 Q. Okay. So you didn't calculate any actual damage to BMG?

6 A. No.

7 Q. You didn't calculate any actual harm of any kind to BMG,
8 did you? Calculate, calculate.

9 A. Sorry. No, I didn't try to calculate. As I explained, I
10 don't think that's possible. Dr. Sullivan in his testimony
11 does, and in my reply testimony, I explained why I thought his
12 analysis, you know, was implausible, and, you know, it was
13 based on assumptions that are insupportable by the data that
14 was available to him or to anybody in this case.

15 Q. Okay. And in your reply, you stated, "I was not asked,
16 nor am I offering an opinion that seeks to quantify damages in
17 this matter." And that's still true, right?

18 A. Yes.

19 Q. Dr. Lehr, part of your opinion about Cox's economic
20 incentives relates to the notion that infringers pay for higher
21 service tiers, right?

22 A. Well, that's -- I mean, in my actual estimate, I can't
23 actually -- I don't have data that would actually allow me to
24 estimate that, but the fact that it leads me to believe that
25 the estimates I've given are a lower bound to the value of

W. Lehr - Cross

1120

1 infringing subscribers because it's more likely that infringing
2 subscribers are more valuable.

3 Q. Right. So I may have misunderstood that. You're saying
4 it's not part of the actual calculations you did, but it is
5 part of your opinion about Cox's economic incentive, right?

6 A. Yes.

7 Q. The notion that folks who are engaged in infringement are
8 going to pay for higher service tiers?

9 A. It's more likely. I think that's right, yes.

10 Q. And that's because they use more data?

11 A. Generally, yes.

12 Q. And need higher bandwidth speeds?

13 A. Yeah. Well, and if you have -- if you're using more data,
14 you benefit from having a higher cap, and if you have higher
15 bandwidth speeds, you're going to get better BitTorrent
16 performance and you're going to have a more pleasurable
17 experience when you're uploading and downloading files, and
18 that also means probably that there are going to be more people
19 pulling files from you because they're also going to get a
20 better experience if they pull the files from you, so more
21 infringing copies are likely going into the network from a
22 higher-speed subscriber.

23 MR. BUCKLEY: Michael, can we pull up DTX 480, which
24 is already in evidence?

25 Q. So, Dr. Lehr, this is a presentation that Rightscorp made

W. Lehr - Cross

1121

1 to Cox in March of 2011. Have you ever seen this before?

2 A. Yes.

3 Q. You have seen this before?

4 A. I have seen this.

5 Q. Can you see, we've got a blow-up at the bottom there, and
6 it says -- this is from somebody at Rightscorp to somebody at
7 Cox. "We have a new patent-pending solution to media piracy
8 that could save Cox tens of millions of dollars in decreased
9 operating expenses."

10 Do you see that?

11 A. Yes.

12 MR. BUCKLEY: Michael, can we go to the next page?
13 It's the one that ends in 821.

14 Q. And so this was from part of Rightscorp's presentation,
15 and that bullet that we've expanded there, "You will reduce
16 average cost per subscriber by reducing network traffic," do
17 you see that?

18 A. Yes.

19 Q. So Rightscorp's pitch was your costs are actually going to
20 go down if you terminate these folks who are allegedly
21 infringing because they're a drain on the network, which seems
22 to me to be the opposite of the point you're making; is that
23 right?

24 A. No. I don't, I don't think that's the point I'm making,
25 nor is it potentially inconsistent. When I look at this, first

W. Lehr - Cross

1122

1 off, this is talking about something different than what I was
2 talking about. This is talking about cost, but you have to ask
3 yourself, assuming this number were right, in other words,
4 would I reduce -- this is average cost, not the incremental
5 cost, so it's potentially the total cost of the capacity cost
6 maybe, but what's the revenue effect of that? That's not
7 talking about that.

8 And then as you said, this is a pitch, so it's a
9 marketing hype potentially. They're claiming you're going to
10 save this amount of money, but, you know, maybe they will,
11 maybe they won't. Maybe those fixed costs might go down if
12 they had a better managed network or if they could shift their
13 BitTorrent traffic off-peak.

14 So it doesn't cost them anything basically if people
15 are downloading a bunch of stuff when the network is not
16 congested, and so if the guys are doing it in the middle of the
17 night, it's not an issue. It is an issue for the customers,
18 though, because the customers are facing the data cap. So they
19 pay more to Comcast even though it doesn't cost Comcast more if
20 they download more data in the right way.

21 Q. Dr. Lehr, you understand that what Rightscorp was saying
22 to Cox here is sign up for our program and terminate more
23 infringers because it will save you money in the long run, and
24 your opinion is hold onto as many infringers as you can because
25 you'll make more money in the long run?

W. Lehr - Cross

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1 MR. WARIN: Your Honor, mischaracterizing earlier
2 testimony about what the Rightscorp people were saying. There
3 was testimony about this brochure from them. You know, he
4 didn't author it.

5 THE COURT: If he can answer the question, I'll
6 permit it. So --

7 THE WITNESS: I don't see this is -- I mean,
8 basically if what they're saying is lose the traffic, you'll
9 reduce your costs by 25 or 40 percent and that's what you're
10 going to do, you'll lose the traffic, you'll lose the costs.
11 If you believe this estimate, you'll also lose the revenue.

12 As I explained to you, the revenue you lose is much,
13 much more than the cost. So that loss of revenue, you're
14 losing a hundred bucks per subscriber, that's a bad business
15 decision.

16 Now, I understand why Rightscorp wasn't telling them
17 how to get more subscribers and make more business. It was --
18 the product it was selling them was telling them how to manage
19 their network better, and they were making a pitch to Cox about
20 that. That's -- you know, that's what this is. I don't think
21 there's any inconsistency between this and my analysis.

22 BY MR. BUCKLEY:

23 Q. Dr. Lehr, in your deposition, in the discussion about
24 terminating subscribers, you indicated that you didn't have an
25 opinion about how many more subscribers Cox should have

W. Lehr - Cross

1124

1 terminated than it, in fact, did based on infringement
2 allegations, right?

3 A. Yes. I was not offering any opinion of what Cox's legal
4 obligation was or what their business practices ought to have
5 been with respect to terminating customers or not.

6 Q. And you also didn't try to quantify how many more
7 customers Cox should have terminated than it did?

8 A. That's right, yes.

9 Q. Do you know how many subscribers Cox has terminated for
10 infringement allegations in the last five years?

11 A. I don't know right now.

12 Q. Have you seen any data as part of your work of the number
13 of terminations Cox has performed?

14 A. I might have, but I don't recall what it was because I,
15 you know, I knew I wouldn't be trying to offer an opinion about
16 what specifically they should have done, because I was trying
17 to discuss the economics of this rather than, you know, sort of
18 what the business practices or the legal obligations of Cox was
19 in this situation.

20 Q. Do you remember acknowledging at your deposition that it's
21 possible that some appropriate response to infringement might
22 involve terminating some amount of subscribers? Would you
23 still agree with that?

24 A. Yeah. As a hypothetical, certainly it seems very
25 reasonable to me.

W. Lehr - Cross

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1 Q. Yeah. And you also said it's not inconsistent that they
2 would need to terminate some subscribers to maximize their
3 subscriber base or retain, you know, a profitable number of
4 subscribers? Do you remember saying that?

5 MR. WARIN: Your Honor, beyond the scope and beyond
6 his expert testimony.

7 THE COURT: Well, I think what I'm hearing is it was
8 discussed in his deposition, but you're saying it wasn't part
9 of his expert report or his --

10 MR. WARIN: And I didn't ask him questions about it.

11 THE COURT: Well, I agree.

12 MR. BUCKLEY: Your Honor, I'll end it after this.
13 This goes to the number of people they should or should not be
14 terminating, and that is -- it's embedded in his entire
15 analysis.

16 THE COURT: He just said that he didn't -- wasn't
17 asked to and didn't calculate that and it wasn't part of his
18 opinion.

19 MR. BUCKLEY: Yes.

20 THE COURT: Okay. Then that ends that. Objection
21 sustained.

22 BY MR. BUCKLEY:

23 Q. Okay. Dr. Lehr, just a final question to make sure that I
24 understood you correctly. You were not asked to and you are
25 not quantifying damages in this case; isn't that right?

W. Lehr - Cross

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1 A. I'm not trying to come up with the -- I'm certainly not
2 trying to quantify the damages to BMG because I don't have
3 those, but I think the estimates that I've provided in this
4 case might be relevant for any such calculation to be done, but
5 I'm not offering an estimate of the damages.

6 Q. And you didn't do those calculations?

7 A. And I did not do those calculations.

8 MR. BUCKLEY: Thank you. Nothing further, Your
9 Honor.

10 THE COURT: All right, thank you.

11 Any redirect?

12 MR. WARIN: No redirect, Your Honor.

13 THE COURT: All right. May Dr. Lehr be excused?

14 MR. WARIN: Subject to recall after Dr. Sullivan.

15 THE COURT: All right. Then you're excused at this
16 time, Dr. Lehr. Please don't discuss the testimony you've
17 given with any of the fact witnesses involved in the case, all
18 right?

19 THE WITNESS: Yes.

20 THE COURT: All right. Thank you, sir. Have a good
21 afternoon.

22 THE WITNESS: You, too.

23 (Witness excused.)

24 THE COURT: Why don't we do this: Let's take our
25 afternoon break for 15 minutes, and then we'll come back and I

1 think I'll tell you where we are.

2 We have some deposition testimony left?

3 MR. WARIN: We have the videotape of Jason Zabek.

4 THE COURT: Okay.

5 MR. WARIN: And I think that's the last witness
6 either by deposition or live witness we will have, and then
7 there are some interrogatory answers from Cox that we intend to
8 move, and we've identified those for Mr. Buckley already.

9 MR. BRIDGES: We will need to discuss that last
10 issue.

11 THE COURT: Okay. Then we'll take our -- we'll come
12 back at, you know, 10 minutes of four, and we'll have a video
13 deposition testimony, and then we'll go from there, all right?
14 All right, you're excused. Thank you.

15 (Jury out.)

16 THE COURT: Have you talked about the interrogatory
17 issue and what's objectionable and what isn't and gone as far
18 as you can get without my assistance?

19 MR. BUCKLEY: No, Your Honor. So we were just given
20 the list of documents right before we got started this
21 afternoon, so I actually haven't even had a chance to look at
22 them. I don't know what they are.

23 THE COURT: Okay. Do you have copies of them? Did
24 you give copies of them or --

25 MR. THEODORE: They have copies; we have copies.

1 THE COURT: All right.

2 MR. BUCKLEY: We've got copies of them now.

3 THE COURT: You have copies, all right. Well, have
4 you had a chance to look at them yet?

5 MR. BRIDGES: I've looked at them just a little bit.

6 THE COURT: Okay. Why don't you work on that a
7 little bit and get as far as we can. Then we'll take, take
8 that up when we get back, all right?

9 MR. BUCKLEY: Thank you, Your Honor.

10 MR. WARIN: Thank you, Your Honor.

11 THE COURT: All right, how about 5 minutes to four?
12 You may need a little extra time.

13 All right, thank you. We're in recess.

14 NOTE: At this point a recess is taken; whereupon at
15 the conclusion of which the case continues in the absence of
16 the jury as follows:

17 JURY OUT

18 THE COURT: Okay. Joe, let's get our jury. Well,
19 hold on, Joe.

20 Did we resolve the interrogatory answers, or is that
21 going to take some time?

22 MR. THEODORE: We think that these are admissions,
23 Your Honor. We'd like to move them in. They've asked that the
24 objections come out, at least, and we're happy to pull out the
25 objections and prepare revised versions. But we think these

1 are party admissions and they come in.

2 MR. BUCKLEY: Your Honor, the issues are broader than
3 that. Part of the problem is that I was just asked this right
4 before we got started with Dr. Lehr.

5 THE COURT: Yeah.

6 MR. BUCKLEY: So just the first set, the very first
7 one, interrogatory number 21, relates to reliance of opinion of
8 counsel or legal opinion as a defense, which you struck.

9 So I really think we need to have a true meet and
10 confer rather than doing it on the fly at a break.

11 THE COURT: All right. Well, you've moved them in.
12 I will table that until I have given an opportunity to
13 Mr. Buckley or other members of the team to look at them and
14 rule on their admissibility at that time. And it may be that
15 it's tomorrow. Even if so, I won't -- you've formally moved
16 them in there, they're part of your case in chief to the extent
17 they're not objected to and precluded. Okay. Does that work?

18 MR. THEODORE: Thank you, Your Honor.

19 THE COURT: All right, Joe, let's get our jury.

20 So this is more homework for you, Mr. Buckley. Give
21 Reilly something to do, will you?

22 MR. BUCKLEY: I think I know what he would say.

23 NOTE: At this point the jury returns to the
24 courtroom; whereupon the case continues as follows:

25 JURY IN

1 THE COURT: All right, please be seated.

2 Who has got the --

3 MR. WARIN: Your Honor, we call as our next witness
4 by videotape, Jason Zabek.

5 THE COURT: All right. Thank you, sir. And this
6 will include the designations and the counter-designations by
7 Cox, is that correct, sir?

8 MR. WARIN: That's correct. And I think we have no
9 disagreement at this point with respect to any of that.

10 THE COURT: All right. Good, then let's hit the
11 dial.

12 NOTE: Portions of the JASON ZABEK videotape
13 testimony are played; at the conclusion of which the case
14 continues as follows:

15 MR. WARIN: Your Honor, I believe that there are four
16 exhibits that were identified in the deposition that were not
17 previously admitted. And I believe those are PX 1371, PX 1387,
18 PX 1393, and PX 1394. I believe by agreement with Mr. Buckley,
19 and consistent with earlier rulings of the Court, those should
20 be admitted now.

21 THE COURT: All right. Mr. Buckley.

22 MR. BUCKLEY: No objection, Your Honor.

23 THE COURT: All right. They are all received.

24 MR. WARIN: Thank you.

25 THE COURT: Mr. Warin, that's the end of -- with the

1 exception of some admission matters, that's BMG's case in
2 chief; is that correct, sir?

3 MR. WARIN: Yes, it is, Your Honor. Thank you.

4 THE COURT: All right. Well, we are getting towards
5 the end of the evening. We have some matters to discuss, and
6 so I am going to let you go now to return at 9:00 o'clock
7 tomorrow morning.

8 And again, you know, go home, enjoy the evening and
9 don't -- please don't discuss the testimony you have heard here
10 with anyone, and don't do any research or investigation.

11 All right. Thank you all. We will see you tomorrow.

12 NOTE: At this point the jury leaves the courtroom;
13 whereupon the case continues as follows:

14 JURY OUT

15 THE COURT: All right. I will give you time tonight
16 to look at the interrogatory answers. Are there any motions at
17 this time? Mr. Wakefield.

18 MR. WAKEFIELD: Thank you, Your Honor.

19 We do have JMOLs for the record. And to start with
20 direct infringement. Cox submits there has been a failure of
21 proof on direct infringement under 106(3), distribution. There
22 has been no evidence of a transmission from a Cox account to
23 any person other than Rightscorp and possibly Barbara
24 Frederiksen-Cross, who was plaintiff's agent.

25 So two of plaintiff's agents obtained some torrents,

1 but there is no evidence of a distribution to anyone else, and
2 certainly no evidence of a distribution to the public as 106(3)
3 requires.

4 Rightscorp, not other users, initiated each
5 transaction. BMG authorized Rightscorp as its agent to
6 initiate these transactions. So there is no evidence of any
7 unauthorized distribution, even assuming that a digital
8 transmission constitutes a distribution. Obviously we
9 disagree, but understood the Court's view of that in the
10 summary judgment ruling.

11 Under 106(1), reproduction, there is no evidence that
12 any Cox user downloaded BMG's songs over the Cox network. In
13 other words, there is no evidence that they made a copy on
14 their computer while using the Cox network. They possessed
15 files according to the Rightscorp data, but they might have
16 gotten those files at college, while describing to another ISP,
17 or sitting in a Starbucks.

18 Which takes me to the issue of speculation versus
19 circumstantial evidence. BMG got subscriber information for at
20 least 122 holders of Cox accounts whom BMG accused of
21 infringement in this case. It failed to provide evidence of
22 any actual activities by any single individual. They brought
23 in one unreliable declaration which wasn't going to prove
24 anything and was excluded properly.

25 The likely response is, well, it's too hard to prove

1 because this is a mass -- an allegation of mass infringement,
2 but mass infringement still requires proof of infringement.
3 There shouldn't be gimmes for a case where a party is seeking
4 \$150,000 per work.

5 Many copyright holders want to sue intermediaries
6 rather than individuals because proof that an individual
7 actually infringed is inconvenient, but we didn't make the law,
8 and that's the proof that the Copyright Act requires. And we
9 don't think there should be a lower burden on direct
10 infringement than there would be for individuals.

11 Moving to contributory. We argued in summary
12 judgment that Grokster really changed the playing field. But
13 let's go pre-Grokster with Sony, the Supreme Court standard,
14 the Betamax case. The Court considered there the traditional
15 contributory test, knowledge and material contribution, and it
16 ruled that a defendant could not be liable under that test for
17 providing a technology that is capable of significant
18 non-infringing uses.

19 Sony in that case knew that there was infringement
20 occurring with the Betamax. And the allegation here is Cox
21 knows that there is this stuff going out there. It might not
22 that a specific person did it, but there is a widespread
23 problem, everyone knows about it.

24 Well, everyone knew Betamax VCRs were used for
25 unauthorized copying. In fact, that's what that machine did.

1 That machine did nothing but copy video, which was ever since
2 1976 protected the moment it was fixed in the tangible media.
3 This was a copy machine.

4 We don't make copy machines. We provide a pipe.
5 Barbara Frederiksen-Cross put it out, it is a pipe to the
6 Internet.

7 Anything can happen on the Internet and we don't
8 control it, and we are not contributing to the particular
9 choices that people make merely by providing them a pipe. The
10 Internet is capable of substantial non-infringing use. I had
11 to use it to file things with this Court. So there is no
12 question of that, and I think the law should be clear.

13 Their theory converts contributory infringement into
14 a whole new thing, into some sort of species of negligence law
15 where if you ought to know something, you ought to have a duty,
16 you ought to do something about it. And that's really a
17 dramatic liberalization and expansion of contributory
18 infringement law beyond where it has been.

19 Finally, vicarious. As I know my colleague,
20 Mr. Bridges, argued in the summary judgment motion, it's about
21 a relationship. Vicarious liability turns on a special
22 relationship between a wrongdoer and a defendant. Typically,
23 employer/employee, principle agent, partners in a partnership.
24 Cox has a contractual relationship with customers like every
25 business that provides a service does. If that's enough, then

1 virtually any business that's capable of shutting anyone off
2 becomes liable for vicarious liability because it has the
3 alleged right and ability to supervise.

4 But think about the language in the Fourth Circuit
5 standard, right and ability to supervise. That is different
6 than the ability to turn off a service.

7 Cox -- there is no evidence that Cox supervises the
8 particular decisions that individuals, millions of individuals
9 make.

10 And direct financial interest, what has been shown
11 here with evidence is that Cox does not want to lose customers,
12 true of every business. But it is not like the Napsters of the
13 world who were running infringement businesses. Cox provides a
14 pipe to the Internet.

15 And as for draw, I know Your Honor let that survey
16 in, but there is no evidence of any unique draw from that
17 survey to Cox. Cox customers are like other ISP customers.
18 There is no evidence to show that they are not.

19 So there is no evidence of direct financial interest
20 and certainly no right and ability to supervise.

21 THE COURT: Thank you, Mr. Wakefield.

22 MR. WAKEFIELD: Thank you, Your Honor.

23 THE COURT: Mr. Pecau.

24 MR. PECAU: Your Honor, this is -- the argument that
25 the defendant is making is really just a rehash of the summary

1 judgment arguments. It doesn't really address the evidence
2 that was introduced. And, Your Honor, we believe that the
3 evidence, consistent with your prior opinion, the plaintiffs
4 have overwhelmingly made their case.

5 In terms of the issue of direct infringement, Your
6 Honor, there is plenty of evidence that there was direct
7 infringement by Cox customers. This evidence is shown in a
8 variety of formats.

9 It certainly was shown by the fact that Rightscorp
10 received the hash values, which are fingerprints of the actual
11 infringements that were occurring by Cox subscribers. In
12 addition to that, they had actual downloads.

13 And as Your Honor mentioned in your motion for -- in
14 our motion for summary judgment and your order, that it is long
15 been the history of all courts that evidence that is gathered
16 by private investigators in copyright cases and in other cases
17 is evidence of infringement. And that's what we have here.

18 In addition to that, Your Honor, as our experts have
19 shown, is that the nature of the -- of BitTorrent is the fact
20 that these files go up and down. And, you know, when somebody
21 is receiving -- when somebody is uploading something, that they
22 are already downloading or have downloaded. And there is
23 plenty of circumstantial evidence that this jury could find
24 that there was not only infringement by Cox subscribers, but
25 there was massive infringement by Cox subscribers.

1 Now, with respect -- now, with respect to the two
2 secondary liability issues, Your Honor, I will be very quick
3 about that. The first one is contributory infringement has two
4 requirements, as Your Honor knows. The first thing is that you
5 have to have knowledge of the infringement.

6 And, Your Honor, I think the evidence clearly shows
7 that there was constructive knowledge by the fact that all of
8 these notices were given to Cox and the nature of those
9 notices. With all the information that they contain and the
10 fact that they were under penalty of perjury, gave Cox
11 constructive knowledge.

12 In addition, Your Honor, I think that we have made a
13 very strong case for willful blindness that the jury can find,
14 and obviously I think that issue is up to the jury.

15 But, Your Honor, I think the evidence is overwhelming
16 that this isn't just a matter of one isolated incident where
17 Cox decided that, you know, because of the nature of these
18 notices, we're just going to blacklist them because they are
19 seeking settlement.

20 As we have argued from the beginning, this is a
21 holistic thing. This entire thing is a sham that was set up
22 not only to block people on blacklisting, to give artificial
23 hard limits, as Your Honor can see, that it is virtually
24 impossible. In fact, it almost beggars the imagination that
25 anybody could get up to a level 13. We saw the one ticket of

1 how those hard limits allowed somebody to continue to infringe
2 for 28 times over a two-and-a-half year period, and the Cox
3 witness said that's not a habitual user.

4 What they consider to be habitual users are people
5 that manage to go through this whole system three times, and
6 even then they're thinking, well, maybe, maybe we should
7 terminate them, and ultimately decide not to because DMCA
8 equals non-terminate, re-activate.

9 So, Your Honor, I think there is plenty of evidence
10 in terms of constructive knowledge.

11 And then in terms of material contribution. Your
12 Honor, obviously Cox controls the access to the Internet. And
13 you can see that with their CATS system, that they have a lot
14 of control over it. And they are completely cognizant of that
15 control. They have the AUP, which is completely dependent on
16 the fact that they know that they have the control over this
17 thing.

18 And you can see that even Mr. Vredenburg, sitting at
19 his desk, he can look at a ticket history and he can decide
20 whether to give them access or not. That is control, Your
21 Honor.

22 And in terms of vicarious liability, the law is no
23 longer that you have to have a parent/child relationship or an
24 employer /employee relationship. That changed with Gershwin in
25 1973 and has not been the law anywhere since then.

1 What you have to do for vicarious liability is you
2 have to have the right to control and the ability to control.
3 And, Your Honor, I don't think that there is any question in
4 anyone's mind that under the AUP they had the right to control.
5 And certainly Mr. Vredenburg's testimony and Barbara
6 Frederiksen-Cross' testimony, and virtually every witness who
7 knows anything about this system knows that they have the
8 ability to control and to supervise the particular activities
9 that go on. I mean, that ticket showed plenty of ability to
10 supervise exactly what was going on.

11 And then in terms of the financial benefit. We have
12 e-mail after e-mail in which Cox realized that they were
13 getting a financial benefit from continuing this infringement.
14 There is no doubt that they were getting a financial benefit.
15 And what was that benefit? They clearly saw that their
16 customers were getting a value to be able to infringe. And for
17 example, we just heard Mr. Zabek said, you know, when they're
18 looking at somebody who has been one of these multiple
19 infringers and whether they're going to cut them off or not, he
20 was thinking what the financial benefit was. And he decided
21 that he would do what is right for Cox and for the infringer.

22 It wasn't in his idea that he was going to do the
23 right thing, which he knew that what these folks were engaging
24 in, using his own words, that they were engaged in theft. And
25 what did Cox do? It aided and abetted that theft.

1 And then finally we have the draw, Your Honor. And
2 the draw is -- as Dr. Nowlis said, the issue was he asked Cox
3 subscribers two things. First he asked them, are you using
4 sites such as ThePirateBay, Kickass Torrents, and Torrentz to
5 upload or download free digital music. And 16 percent, one out
6 of six, Cox subscribers said that.

7 Then he asked them, is this -- basically, is this a
8 reason that you subscribe to Cox? And 70 percent of those
9 people, which you do the math, it comes out to about 10 percent
10 of the people said it is a reason that I subscribe to Cox, so
11 that I can download and upload free digital music through sites
12 such as ThePirateBay, Kickass Torrents, and Torrentz.

13 And the evidence is clear that if you -- that if you
14 are downloading and uploading free music through sites such as
15 ThePirateBay, Kickass Torrents, and Torrentz, you are illegally
16 downloading, whether you know it or not, but that's what you're
17 doing. There is no doubt about that.

18 So these folks clearly see the value of Cox to them.
19 Cox sees the value of infringing to them. And this gives you
20 plenty to find -- the jury to find that there was vicarious
21 liability.

22 Thank you, Your Honor.

23 THE COURT: All right, thank you. Well, as you
24 know -- and we spent a lot of time looking at this before we,
25 you know, handed down our summary judgment decision in -- the

1 substance of it shortly before the trial started. And whether
2 I'm right or wrong, somebody else is going to decide. But, you
3 know, I considered the arguments of both parties pretty
4 carefully and came down with my decision.

5 So the issue before me now is did the evidence
6 conform to the decisions that I made. And I believe that the
7 evidence did conform to it, and that the jury will receive
8 evidence that they may consider which -- in which they could
9 find that BMG has met its burden in each of the instances that
10 we've discussed this evening.

11 So I'm going to deny the judgment as a matter of law.
12 Your exception, of course, is noted.

13 How long do you think is it going to take to put
14 Cox's case in?

15 MR. BUCKLEY: Probably four to five days, Your Honor.

16 THE COURT: Really?

17 MR. BUCKLEY: Yeah.

18 THE COURT: God. You're now my most unpopular person
19 in the room.

20 MR. BUCKLEY: See how they both looked at me to stand
21 up.

22 THE COURT: The deliveryman. Go back to doing your
23 community service projects in Portland.

24 MR. BUCKLEY: I would like to.

25 THE COURT: Really? Come on, you're kidding me. No,

1 how many witnesses do you have? I mean, you've got Sullivan.
2 How many experts?

3 MR. BUCKLEY: We've got two experts, Your Honor,
4 Dr. Sullivan and Mr. Rucinski, who is going to talk -- and
5 Mr. Poret, our survey expert.

6 THE COURT: Okay. And then how many other witnesses?

7 MR. BUCKLEY: Four or five.

8 THE COURT: Okay. So we'll go through the end of the
9 week in any event. All right. I'll explain that to the jury.

10 As I said, I've got this argument in Richmond on
11 Monday, so we won't sit on Monday. We'll just come back
12 Tuesday.

13 And then you've got decisions on the rebuttal
14 evidence. And, you know, let's target what you think is
15 important rather than trying to put your case in a second time
16 because -- well, you've already put it in twice, but now don't
17 try it a third time. So -- okay.

18 So, Mr. Buckley, you're going to look at the
19 interrogatory answers tonight and see if you can't work that
20 out. And you'll have your witnesses ready to start tomorrow
21 morning?

22 MR. BUCKLEY: Absolutely.

23 THE COURT: Okay.

24 MR. BUCKLEY: Your Honor, we also have designations
25 and cross-designations for one of the videos that we may show,

1 Chris Sabec, the Rightscorp CEO, we may play portions of his
2 video.

3 THE COURT: Okay. Yeah. Joe? So I'll get that to
4 you in the morning? Mr. Buckley, I'll get this back to you in
5 the morning?

6 MR. BUCKLEY: That would be great. Thank you, Your
7 Honor. And if you would like to hear -- if you have questions
8 about it and want to hear a little argument on it in the
9 morning, we can do that too.

10 THE COURT: Okay. All right, good. All right,
11 anything else tonight?

12 MR. PECAU: I don't think so, Your Honor.

13 THE COURT: All right. Thank you.

14 We're in recess.

15 NOTE: The December 8, 2015 portion of the case is
16 concluded.

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18

19 We certify that the foregoing is a true and
20 accurate transcription of our stenographic notes.

21

22 /s/ Norman B. Linnell
Norman B. Linnell, RPR, CM, VCE, FCRR

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24 /s/ Anneliese J. Thomson
Anneliese J. Thomson, RDR, CRR

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